Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SPIRIT LAKE TRIBE,

Petitioner,

v.

STATE OF NORTH DAKOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

15 Stat. 505 ratifies a treaty with an Indian Tribe and delimits the land which Congress asserted federal ownership of in trust for the Tribe. In 1971, a federal employee accepted a quitclaim deed to a portion of the land which 15 Stat. 505 claimed in trust for the Tribe (under the interpretation of 15 Stat. 505 which the parties concede applies based upon the posture of this case).

1. Where Congress claims federal ownership in trust and a federal employee asserts federal ownership in fee, is the federal employee's assertion a federal "claim to land" for purposes of the statute of limitations contained in the Quiet Title Act, 28 U.S.C. § 2409a(g)?

2. If the federal employee's act does constitute a claim for purposes of the Quiet Title Act, can a federal associate solicitor abandon the federal employee's unlawful claim and reclaim the land in trust?

3. Where a District Court grants a defendant's motion for summary judgment on a jurisdictional issue and does not resolve disputed issues of fact, does the Court of Appeals have authority to resolve disputed issues of fact against plaintiff?

PARTIES TO THE PROCEEDING

Petitioner is the Spirit Lake Tribe. At the time this litigation was initiated, the Tribe was known as the Devils Lake Tribe.

Respondents are the State of North Dakota, the Garrison Diversion Conservancy District, the United States of America, 101 Ranch, Ruth Ward, Ralph Ward, Steve A. Ward, Imogene Christensen, Claire Engelhardt, Reginald Herman, Eileen Herman, Arnold Yri, Vernyll Yri, Clifford M. Johnson, Melvin Diehl, Dustin King, the Estate of Mabel Solheim, the Estate of Minnie Johnston, Francis Schneider, and Gloria Schneider.

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

DISCUSSION OF LAW 7

I. This Court should review the Court of Appeals' decision that, even though Congress, via a federal statute, claimed land on behalf of the United States, a federal employee's acceptance of a quitclaim deed to that land constitutes a contrary claim to that same land for purposes of triggering the QTA statute of limitations 7

A. The Constitution prohibits federal executive branch officials from disclaiming the United States ownership of Devils Lake in trust for the Devils Lake Sioux Tribe 8

B. In cases where there is not a contrary claim to land made by Congress, this Court has held that, for purposes of the QTA statute of limitations, a federal executive branch officer can claim land on behalf of the United States 13

C. This Court should resolve the tension between its cases under the quiet title act statute of limitations and its cases holding that only Congress can disclaim a federal interest in land 14

TABLE OF CONTENTS – Continued

Page

II. The Court of Appeals majority opinion directly conflicts with the decisions of the Ninth Circuit in *Michel v. U. S.*, 65 F.3d 130 (9th Cir. 1995) and *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989) and with the decision of the District of Columbia Circuit in *Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000) 15

III. There is a lack of clarity in the law and a divergence of opinion among the circuits regarding the scope of appellate review of a district court grant of a motion for summary judgment on a jurisdictional issue 18

A. With the agreement of the parties, the District Court held that it would determine if the United States jurisdictional defense could be resolved upon undisputed facts 19

B. The Appellate Court reviewed the District Court's decision as if the District Court had determined the jurisdictional issue on the merits 20

C. This Court has not ruled upon the issue of law presented herein, and the Courts of Appeals have reached divergent positions on this important issue of law 21

D. Had the Court of Appeals properly applied the summary judgment scope of review to the facts of this case, it would have reinstated the Tribe's claim that the United States owns the lakebed in trust for the Tribe 24

CONCLUSION 27

TABLE OF AUTHORITIES

Page

SUPREME COURT

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 19, 21

Idaho v. United States, 533 U.S. 262 (2001) ...3, 5, 11, 12

Johnson v. Jones, 515 U.S. 304 (1995).....19, 22

Kleppe v. New Mexico, 426 U.S. 529 (1976) 9

Mitchell v. Forsyth, 472 U.S. 511 (1985) 19, 21

Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 9

Royal Indem. Co. v. United States, 313 U.S. 289 (1941).....9, 10, 12

Siegert v. Gilley, 500 U.S. 226 (1991).....19, 21

State v. Fitzgerald, 40 U.S. (15 Peters) 407 (1841)..... 9

United States v. California, 332 U.S. 19 (1947) 9, 12

United States v. Mottaz, 476 U.S. 834 (1986)..... 14

United States v. Oregon, 295 U.S. 1 (1935)..... 9

United States v. Sante Fe Pac. R. Co., 314 U.S. 339 (1941)..... 9

FEDERAL COURTS OF APPEALS

Bank One Texas v. U.S., 157 F.3d 397 (5th Cir. 1998) 22

Barrera-Montenegro v. United States, 74 F.3d 657 (5th Cir. 1996)..... 22

Devils Lake Sioux Tribe v. North Dakota, 917 F.2d 1049 (8th Cir. 1990)..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Dreier v. U.S., 106 F.3d 844 (9th Cir. 1996)..... 24

Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992) 23

Hohri v. U.S., 782 F.2d 227 (D.C. Cir. 1986)..... 23

Michel v. United States, 65 F.3d 130 (9th Cir. 1995)...15, 16

Poindexter v. U.S., 777 F.2d 231 (5th Cir. 1985)..... 23

RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125 (6th Cir. 1996)..... 23

Shultz v. Department of Army, 886 F.2d 1157 (9th Cir. 1989) 15, 16

Spirit Lake Tribe v. North Dakota, 262 F.3d 732 (8th Cir. 2001) ..... *passim*

United States v. City and County of San Francisco, 310 U.S. 16 (1940) 9

Warren v. United States, 234 F.3d 1331 (D.C. Cir. 2000)..... 9, 15, 17

Wenz v. Memery Crystal, 55 F.3d 1503 (10th Cir. 1995) 262 F.3d 732 (Aug. 17, 2001)..... 24

Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981) 23

Ynclan v. Department of Air Force, 943 F.2d 1388 (5th Cir. 1991)..... 22

Zappia Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi, 215 F.3d 247 (2nd Cir. 2000) 23

TABLE OF AUTHORITIES – Continued

Page

FEDERAL DISTRICT COURTS

United States v. Idaho, slip op (D. Idaho.), *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *aff'd*, 533 U.S. 262 (2001) 10

Devils Lake Sioux Tribe v. North Dakota, 714 F.Supp. 1019 (D.N.D. 1989) 1

Spirit Lake Tribe v. North Dakota, Memorandum and Order, (D.N.D. 2000), Slip op. 6, 20, 21

CONSTITUTION, STATUTES AND COURT RULES

U.S. Const. Art. I, § 1 ..... 2, 9

U.S. Const. Art. I, § 8, Cl. 3 2

U.S. Const. Art. IV, § 3, Cl. 2 ..... 2, 8, 11, 15, 18

28 U.S.C. § 1331 5

28 U.S.C. § 1362 5

28 U.S.C. § 2154(1) 1

28 U.S.C. § 2409a 2, 5, 13

15 Stat. 505 ..... 3, 4, 5, 6, 10

96 Stat. 2515 ..... 4, 11

Fed. R. App. Proc. 28(j) 12

Fed. R. Civ. Proc. 12 ..... 16, 18, 19, 20, 23

Fed. R. Civ. Proc. 56 20

PETITION FOR A WRIT OF CERTIORARI

The Spirit Lake Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

There are three reported and one unreported decisions in this matter. The District Court opinion is in an unreported decision entered on January 24, 2000 App. B. The judgment of the Court of Appeals from which the Tribe petitions for a writ of certiorari is based upon an opinion reported at 262 F.3d 732 (Aug. 17, 2001), App. A (*hereinafter Spirit Lake Tribe*), *reh'g denied,* (November 12, 2001), App. D.

The above opinions were from proceedings after remand of *Devils Lake Sioux Tribe v. State of North Dakota,* 917 F.2d 1049 (8th Cir. 1990). App. C. That opinion reversed *Devils Lake Sioux Tribe v. State of North Dakota,* 714 F.Supp. 1019 (D.N.D. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 2001. A timely filed petition for rehearing was denied on November 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 2154(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution states:

> All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

U.S. Const. Art. I, § 1.

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, § 3, Cl. 2.

The Quiet Title Act's Statute of Limitations states:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

The Treaty between the United States and the Tribe defines the boundaries of the land which the United States owns in trust for the Spirit Lake Tribe as:

> Beginning at the most easterly point of Devil's Lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

15 Stat. 505.

STATEMENT OF THE CASE

The Spirit Lake Tribe, formerly known as the Devils Lake Sioux Tribe, is one of two divisions of the Sisseton and Wahpeton Bands of the Sioux Nation. Long before North Dakota was admitted to the Union, the United States recognized that the Sisseton and Wahpeton Bands owned and occupied an area of several million acres in what is now eastern North Dakota.

In a Treaty dated February 19, 1867, the United States acquired all of the land of the Sisseton and Wahpeton Tribes. Most of that land was placed in the public domain, but the United States took possession of two tracts of land in trust for the Bands. Congress approved the Treaty, and the President signed the Treaty into law.[1]

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[1] The Court of Appeals misunderstood the effect of the 1867 Treaty. The Court of Appeals stated that under the treaty, the "Tribe received vast lands in the Dakotas and Minnesota." *Spirit Lake Tribe* at 736. The Tribe did not receive that land in the Treaty, because the Tribe already had aboriginal title to that land. *See, e.g., Idaho v. United States*, 533 U.S. 262,___ n.5. The Treaty transferred title of that land to the United States, upon

15 Stat. 505. The Reservation described in the 1867 Treaty has been preserved as "the permanent homeland of the [Spirit Lake] Tribe." Act of Jan. 12, 1983, P.L. 97-459, 96 Stat. 2515.

Article IV of the 1867 Treaty described the boundaries of the Spirit Lake Tribe's current Reservation, as follows:

> Beginning at the most easterly point of Devil's Lake; thence *along the waters of said lake* to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

The emphasized phrase of Article IV of the Treaty is patently ambiguous: it could mean that the northern boundary of the Reservation runs along the northern edge of the lake, on a line across the lake, or along the southern edge of the lake. *Spirit Lake Tribe* at 736; *Devils Lake Sioux Tribe* at 1051.

For many years, the State of North Dakota and the Tribe have disagreed regarding whether Congress claimed ownership in trust of the lakebed when it

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the United States Congress' solemn promise to hold the lakebed and other lands in trust for the Tribe.

This misunderstanding permeates the Court of Appeals incorrect legal analysis. By failing to realize that, as all parties agreed, the United States owned the lakebed, the Court of Appeals failed to even discuss the issue which it actually needed to decide: before 1974, did the Tribe have notice that the United States was claiming that its ownership was in *fee* rather than in *trust* for the Tribe.

enacted 15 Stat. 505, or whether the State took ownership of the lakebed under the equal footing doctrine.[2] In 1971, the State of North Dakota sold its disputed claim to 62,000 acres of the lakebed to the United States, and the State provided the United States with a quitclaim deed to that land, App. F.

In 1976, the Associate Solicitor for Indian Affairs in the Department of the Interior, in a thoroughly considered memorandum, stated that "the United States holds title to the lakebed in trust for the Devils Lake Sioux Tribe." App. E. In 1981 the United States "withdrew support from its 1976 opinion that had recognized the Tribe's beneficial ownership of the lakebed," *Devils Lake Sioux Tribe* at 1054. On June 9, 1986, the Tribe filed this lawsuit to confirm its title to the lakebed.

In the District Court below, the Tribe alleged jurisdiction based on 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1362 (federal question asserted by an Indian Tribe), and 28 U.S.C. § 2409a (Quiet Title Act), and the United States asserted that it was immune from suit because the suit was not filed within twelve years of the United States acceptance of the State's quitclaim.

In *Devils Lake Sioux Tribe*, the District Court dismissed the Tribe's complaint, but the Court of Appeals overturned the dismissal and remanded the case. On remand, the District Court bifurcated the trial on the remaining

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[2] Unlike this Court's recent decision in *Idaho v. United States*, 533 U.S. 262, the present case does not involve complex issues regarding whether the congressional expression of its intent preceded statehood. The congressional act at issue was in 1867, over twenty years before North Dakota became a state.

threshold issues from the trial on the merits of the case. The case was stayed for several years while the parties unsuccessfully attempted to negotiate a resolution.

On January 24, 2000, the District Court granted the United States motion for summary judgment on the jurisdictional defense that the United States was immune because suit was not filed within twelve years of accrual. In its grant of summary judgment on that jurisdictional issue, the District Court explicitly stated that it was applying the standard summary judgment burden of proof. *Spirit Lake Tribe v. North Dakota*, Memorandum and Order, (D.N.D. January 24, 2000), Slip op. at 3-4.

The record before the District Court did not contain any evidence that the Tribe learned of the 1971 quitclaim deed before June 9, 1974 and the Tribe denied that it had such knowledge. Further, the quitclaim deed, App. F, does not state that the United States was claiming the land in fee rather than in trust for the Tribe, and the Tribe's position was that, even if it had known of the quitclaim, the deed could not have provided notice that the United States was claiming the land in fee in violation of 15 Stat. 505. Because it was deciding the case under the summary judgment standards, the District Court did not attempt to resolve disputed issues of fact, and it did not even mention the 1971 quitclaim deed, and it therefore did not issue findings of fact regarding that deed.

Nevertheless, and, over a vigorous dissent, the Court of Appeals resolved factual disputes against the Tribe (as discussed in detail in section III of the discussion of law, infra). The Court found that, the evidence "convinces us" that, before June 9, 1974, the Tribe knew or should have

known that, through acceptance of the quitclaim deed to the lakebed, a federal officer was claiming federal ownership of the lakebed. *Spirit Lake Tribe* at 739. Because it misunderstood the effect of the Treaty, *see* n. 1, *supra*, the Court of Appeals did not resolve the separate issue of whether notice of the quitclaim would constitute notice that the federal employee was claiming ownership in fee in violation of the Treaty. The Court then held as a matter of law that, for purposes of the Quiet Title Act's statute of limitations, the federal officer's claim trumped Congress' notice that the United States claimed the land in trust for the Tribe.

DISCUSSION OF LAW

I. This Court should review the Court of Appeals' decision that, even though Congress, via a federal statute, claimed land on behalf of the United States, a federal employee's acceptance of a quitclaim deed to that land constitutes a contrary claim to that same land for purposes of triggering the QTA statute of limitations.

There are two well-established lines of cases from this Court which are brought into tension by the facts of this case. The line of cases which the Tribe relied upon below establishes that, because Congress has the sole constitutional authority to legislate on behalf of the United States, where Congress claims land on behalf of the United States via a duly enacted federal statute, a federal executive branch officer cannot disclaim Congress' claim to the land. Congress' claim is the only federal claim to such land.

The Court below relied upon a different line of cases which holds that, where there is *not* a congressional claim regarding that same land, a federal executive branch officer's acts can constitute a claim to land for purposes of the QTA statute of limitations

While it appears plainly obvious to petitioner that the former line of cases applies in the present case, the Court of Appeals did not agree, and it barred the Tribe's suit, which asserted that Congress claimed ownership of Devils Lake in trust for the Spirit Lake Tribe.

There is no ruling from this Court which directly resolves which line of cases should apply, and this Court should accept review of this case and resolve the uncertainty in this important area of federal constitutional and statutory law.

A. The Constitution prohibits federal executive branch officials from disclaiming the United States ownership of Devils Lake in trust for the Devils Lake Sioux Tribe.

The United States Constitution states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, § 3, Cl. 2.

This Court has described Congress' power under Art. IV, § 3, Cl. 2 in the broadest terms possible:

> We have said that the constitutional power of Congress in this respect is without limitation.

> *United States v. City and County of San Francisco*, 310 U.S. 16, 29, 30 [1940]. Thus neither the courts, nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power.

United States v. California, 332 U.S. 19, 27 (1947). *See also, Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (Congress must specifically authorize the taking of Indian trust land); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (reaffirming and applying *U.S. v. San Francisco's* holding regarding the Property Clause); *United States v. Sante Fe Pac. R. Co.*, 314 U.S. 339 (1941); *United States v. Oregon*, 295 U.S. 1, 27 (1935) ("The laws of the United States alone control the disposition of title to its lands."); *State v. Fitzgerald*, 40 U.S. (15 Peters) 407, 421 (1841) ("No appropriation of public land can be made for any purpose, but by authority of congress.")

Under this broad constitutional authority, where Congress passes a statute claiming land for the United States, only Congress can abandon the federal claim. *United States v. California*, 332 U.S. at 40; *Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941); *Warren v. United States*, 234 F.3d 1331 (D.C.Cir. 2000). This rule of law is a specific application of the rule that Congress is the supreme legislative authority in this country, U.S. Const. Art. I, § 1, and that a federal statute is valid until superceded by a contrary federal statute.

The United States Constitution prohibits federal executive branch officers from disclaiming the federal interest which Congress asserts through a validly enacted federal law.

> Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, cl. 2. Subordinate officers of the United States are without power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. [Citation to eight Supreme Court cases omitted.]

Royal Indem. Co. v. United States, 313 U.S. at 294.

Applying these holdings to the facts of the present case, it is beyond dispute that Congress claimed the land at issue in trust for the Tribe. For purposes of the motion for summary judgment which is the basis of the appeal, it was *conceded* that, via 15 Stat. 505 Congress claimed ownership of the whole of Devils Lake in trust for the Tribe. United States Reply Memorandum in Support of Motion for Summary Judgment at 4 (Dist. Ct. Docket No. 150); U.S. Response Brief to Court of Appeals at 14 n.7.

That concession for purposes of summary judgment was required by the facts of this case. As noted above, the language adopted by Congress in 15 Stat. 505 is ambiguous. *Spirit Lake Tribe* at 736, *Devils Lake Sioux Tribe* at 1051. Resolution of this type of ambiguity in a Treaty with a Tribe would require a lengthy, fact-intensive inquiry into the negotiation of the treaty, the understanding of the Tribe at the time it entered into the Treaty, the uses which the Tribe made of the lake prior to the treaty, etc. *See, e.g., United States v. Idaho*, No. 94-328, slip op., *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *aff'd*, 533 U.S. 262 (2001) (District Court conducted nine day trial to determine congressional intent regarding ownership of a lakebed).

The facts related to all or most of the relevant factual inquires are in dispute.[3]

If the Court of Appeals had applied the line of cases interpreting Art. IV, § 3, Cl. 2 of the United States Constitution, it would have started its analysis with the congressional claim of trust ownership of the land. The Court of Appeals would then have determined if there was any subsequent *congressionally approved* grant of the lakebed to the State or *congressionally approved* claim of federal ownership in fee.

There was no congressionally approved claim of federal fee ownership in fee. To the contrary, in 1983, Congress specifically reaffirmed that the Reservation which it claimed in trust for the Tribe via the Treaty remains "the permanent homeland of the [Spirit Lake] Tribe." Act of Jan. 12, 1983, P.L. 97-459, 96 Stat. 2515. The only federal claim regarding the lakebed (for purposes of the QTA statute of limitations or for any other purpose) was Congress' claim that the United States owned the lakebed in trust for the Tribe.

While this Court has not answered the issue presented in the present case, in a case last term, this Court applied an analysis similar to that discussed above when it determined that the United States owned Lake Coeur d'Alene in trust for an Indian Tribe. *Idaho v. United States*, 533 U.S. 262 (2001) (both the majority and the dissent

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[3] Because, as conceded, the scope of Congress' ownership claim cannot be determined on summary judgment, the Tribe's position is that the merits of this case (i.e. the meaning of the facially ambiguous treaty) is inextricably intertwined with whether the twelve year statute of limitations has expired.

agree that, if Congress claimed a lakebed in trust for the Tribe, only Congress could disclaim that interest).[4] *See also, U.S. v. California* (Court first determined that United States owned land. The Court then held that, because U.S. claim was valid, non-congressional actors could not disclaim federal interest). Under *Idaho v. U.S., U.S. v. California,* and *Royal Indem. Co.,* the only way that the State of North Dakota could have obtained the lakebed (and then subsequently transferred the lakebed to the United States) would have been through federal statute. There has been no such statute.

In its briefs to the Court of Appeals, the Tribe challenged the United States or the State of North Dakota to find even one case in which Congress enacted a property boundary, but activities by federal officers were deemed superior to the notice, by Congress, of the extent of the federal claim. The United States and the State were unable to find any such case, and the Court of Appeals did not cite any such case, because there is no such case.

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[4] This Court's decision in *Idaho v. United States* was entered after oral argument before the Court of Appeals in the captioned matter, but before the Court of Appeals issued its decision. Although the Tribe brought *Idaho v. United States* to the Court of Appeals' attention pursuant to Fed. R. App. Proc. 28(j), the Court of Appeals did not cite or apply this Court's decision in *Idaho v. United States* to the facts of the present case.

B. In cases where there is not a contrary claim to land made by Congress, this Court has held that, for purposes of the QTA statute of limitations, a federal executive branch officer can claim land on behalf of the United States.

Rather than apply the constitutional limitation on executive branch authority discussed above, the Court of Appeals majority held that, through *non-congressional* action, employees of the United States claimed that the United States acquired the lakebed in fee. The non-congressional action which the Court of Appeals majority relied upon was the United States acceptance of a quit-claim deed, by which the State transferred to the United States the State's disputed claim to ownership of 62,000 acres of the lakebed.[5] The Court held that this non-congressional action triggered the start of the twelve year statute of limitations contained in 28 U.S.C. § 2409a. That statute states:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest

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[5] As Judge Bright's dissenting opinion below states, the *Spirit Lake Tribe* majority opinion did not even address the Tribe's argument that Congress' notice of the federal claim was superior to any claim by federal employees. Without even addressing the Tribe's primary argument that Congress' notice is supreme, the majority devoted most of its opinion to the more complex, secondary issue of whether the United States abandoned that alleged non-congressional claim to all or part of the lakebed.

> knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

In applying that statute of limitations, this Court and the Courts of Appeals have held that, where the claim is not contrary to a federal statute, a federal employee's actions can constitute a claim to land for purposes of the Quiet Title Act. *See, e.g., U.S. v. Mottaz*, 476 U.S. 834 (1986) (Plaintiff's claim was barred because, more than twelve years before suit was filed, Plaintiff knew or should have known that United States Forest Service had purchased her interest in land.)

Although this Court and the Courts of Appeals have barred suits based upon federal employees' claims, on behalf of the United States, that the United States owns a parcel of land, this Court has *never* permitted a federal employee to claim land on behalf of the United States when that claim is contrary to a boundary which Congress itself has established.

C. This Court should resolve the tension between its cases under the quiet title act statute of limitations and its cases holding that only Congress can disclaim a federal interest in land.

By relying on *Mottaz*, (and applying that holding to the facts it improperly found on review of a motion for summary judgment on a jurisdictional issue[6]) the Court of Appeals placed the power of federal employees over

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[6] Section III of this petition discusses the Appellate Court's holding that it can resolve disputed issues of material fact against the non-moving party.

the power granted to Congress in Art. IV, § 3, Cl. 2 of the United States Constitution. This Court has never permitted this extremely dubious grant of power to federal employees, and the decision appears to directly contradict this Court's holding that subordinate officers of the United States cannot disclaim land which Congress has claimed. This Court should issue a writ of certiorari and determine whether a federal officer can claim land in fee when Congress has already explicitly claimed that land in trust on behalf of the United States.

II. The Court of Appeals majority opinion directly conflicts with the decisions of the Ninth Circuit in *Michel v. U. S.*, 65 F.3d 130 (9th Cir. 1995) and *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989) and with the decision of the District of Columbia Circuit in *Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000).

The Court of Appeals for the Ninth Circuit, in two separate cases, held that, where a federal officer makes a claim to land for purposes of the QTA statute of limitations, the United States, through a federal officer, can abandon that claim. *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995); *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989). In *Shultz*, the Ninth Circuit held:

> The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later

> assertion is a *new claim* and the statute of limitations for an action on that claim accrues when it is asserted.
>
> . . .
>
> If Shultz's predecessors-in-interest had reasonable notice of the government's claim prior to 1974, the district court should determine if at some subsequent time Shultz or his predecessors *had reason to believe the government did not continue to claim an interest.* In that event, the present claim would have accrued when the government reasserted a claim.

Id. at 1161. (Emphasis added.)

The alleged federal abandonment of a claim at issue in *Shultz* was not based upon congressional action.

In *Michel v. U.S.*, the Ninth Circuit reaffirmed *Shultz*, reversing the District Court's dismissal of the complaint under FRCP 12(b). Similar to *Shultz*, the alleged disclaimer of the federal interest in *Michel* was not by congressional action. In fact, the disclaimer was made orally at a meeting between plaintiffs and a "government official." *Id.* at 133, 134.

Shultz and *Michel* are indistinguishable from the present case, and no other Circuit has directly addressed the issue of whether the Quiet Title Act's statute of limitations will begin to run anew after the United States appears to abandon a claim and then later reasserts the claim.

The Eighth Circuit Court of Appeals directly contradicts *Shultz* and *Michel*. In both *Shultz* and *Michel*, the Court held that, for purposes of the QTA, a federal officer

could abandon another federal officer's claim to the land.[7]

In contrast, in *Spirit Lake Tribe,* the Court cited the law discussed in section IA of this brief, and held that a federal attorney cannot abandon another federal officer's "claim to land". The Court of Appeals for the Eighth Circuit held that only Congress could abandon a federal officer's acts which put a landowner on notice of a federal claim to property. *Spirit Lake Tribe* at 740.

It is puzzling that the Court of Appeals did not apply the principle of law discussed in section IA of this petition to prohibit a federal employee from claiming land contrary to an act of Congress, but the Court then adopted a much more expansive interpretation of that same principle of law (and an interpretation more expansive than any this Court has issued) to prohibit a federal attorney from abandoning a federal employee's unlawful claim to land. *Cf. Warren v. United States,* 234 F.3d 1331 (D.C. Cir. 2000) (Congress claimed land on behalf of the United States. Therefore, for purposes of the QTA statute of limitations, only Congress could disclaim that statutory claim to land).

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[7] In addition to its rejection of *Shultz* and *Michel,* the Court of Appeals lists five other purported reasons for rejecting the Tribe's reliance on the Associate Solicitor's opinion. The Court's remaining reasons for rejecting the Associate Solicitor's opinion are based upon the Court's holding that it was not bound by the common burden of proof and standard of appellate review for a motion for summary judgment. That issue is discussed in section III of this petition.

The Court of Appeals decision contradicts itself, and, more importantly for current purposes, it is contrary to the only other circuits to have addressed the issues of law presented. The Tribe respectfully requests that this Court issue a writ of certiorari to resolve the conflict in the decisions between the Courts for the Eighth and Ninth Circuits, and to render a decision which applies an internally consistent interpretation of Art. IV, § 3, Cl. 2 of the United States Constitution.

III. There is a lack of clarity in the law and a divergence of opinion among the circuits regarding the scope of appellate review of a district court grant of a motion for summary judgment on a jurisdictional issue.

The present case raises the issue of whether the Court of Appeals' scope of review of an order granting summary judgment on a FRCP 12(b)(1) motion is identical to the appellate court's scope of review of the more common order of summary judgment on the merits. The Court below explicitly distinguished motions for summary judgment on the merits from motions for summary judgment on a jurisdictional issue. The Court then held that, when the District Court grants summary judgment on a jurisdictional issue (without receipt of the parties' evidence on disputed issues of material fact and without deciding those disputed issues), the Appellate Court has the authority to resolve disputed issues of facts on appeal. *Spirit Lake Tribe* at 744. This case therefore squarely presents the issue of whether the District Court and the parties have the authority to permit a motion for

summary judgment on a request for dismissal under Rule 12(b)(1).

A. With the agreement of the parties, the District Court held that it would determine if the United States jurisdictional defense could be resolved upon undisputed facts.

When a defendant files a motion to dismiss under FRCP 12(b)(1), the Court can set that motion for hearing or can order that consideration of the motion be deferred until trial. FRCP 12(d). The District Court's ability to defer the 12(b)(1) motion until trial is limited in cases, like the present case, where the 12(b)(1) motion raises a sovereign immunity defense. Where immunity is raised, the Court must resolve that FRCP 12(b)(1) issue at the earliest possible opportunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). *Cf. Johnson v. Jones*, 515 U.S. 304 (1995) (holding that, where the merits of a qualified immunity defense were inextricably intertwined with the merits of the case, the court would not be able to resolve the immunity issue until it resolved the merits of the case in chief). The reason for this rule is that "the essence of . . . immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). *See also, Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Applying that law to the facts of the present case, the District Court had a duty to resolve the United States' sovereign immunity defense in an expeditious manner. The United States position was that its sovereign immunity would be least impinged upon if the Court would

attempt to resolve the jurisdictional defense without subjecting the United States to an evidentiary hearing. The United States claimed that an evidentiary hearing was not necessary because the *undisputed* facts established a lack of jurisdiction.

While FRCP 12(d) does not specifically permit summary judgment on a jurisdictional issue, the procedure adopted by the parties and the Court was well-suited to the facts of this case. It is also analogous to the procedures which Courts apply to resolve claims on the merits. For a claim on the merits, the Court can rule on the claim on the pleadings (Fed. R. Civ. Proc 12(b)(6)), on the undisputed facts (Fed. R. Civ. Proc. 56), or after trial.

B. The Appellate Court reviewed the District Court's decision as if the District Court had determined the jurisdictional issue on the merits.

Although the parties adopted a procedure which is not prohibited by the federal rules, the Court of Appeals, post hoc, converted the United States' motion for summary judgment on the jurisdictional issue to a motion on the merits of the jurisdictional issue. The Court held that "the Tribe is not entitled to the benefit of every favorable inference because, strictly speaking, we are not reviewing the propriety of summary judgment." *Spirit Lake Tribe* at 744.

The Circuit Court majority was wrong: it was reviewing an order based upon a motion for summary judgment. *Spirit Lake Tribe v. North Dakota*, Memorandum and Order, (D.N.D. January 24, 2000) at 17 ("It is ordered that the United States Motion for Summary Judgment (Dkt.

116) is granted and that a judgment of dismissal be entered as to all named defendants in the plaintiff's complaint."); Docket Entry 116 ("Defendant United States of America, by its attorneys, hereby moves for summary judgment and dismissal of this action" on jurisdictional grounds.). *See also, Spirit Lake Tribe v. North Dakota, Memorandum and Order, passim* (District Court repeatedly stated and demonstrated that it was not resolving disputed issues of material fact.)

The State's and the United States' briefs to the Court of Appeals explicitly acknowledged that the standard summary judgment burden of proof and summary judgment standard of review applied to this appeal. Brief of State of North Dakota and Garrison Diversion Conservancy District at 28, 29, 33-34; Answering Brief for the United States at 14, 27 n.13, 42-44; Supplemental Brief for the United States at 17 n.5.

C. This Court has not ruled upon the issue of law presented herein, and the Courts of Appeals have reached divergent positions on this important issue of law.

The Court of Appeals' holding that the District Court and the parties cannot agree to attempt to resolve a jurisdiction dispute on undisputed facts is not contrary to any direct holding of this Court. But it is contrary to the explicit rationale for this Court's decisions in *Harlow*, *Siegert*, and *Mitchell*. Those cases are premised on the rule that a claim of sovereign immunity should be resolved in a manner which, while insuring plaintiff's right to due process of law, also resolves the immunity claim with the

least possible impingement on the claimed immunity. By hearing the United States' motion claiming that the case could be resolved on the undisputed facts, without subjecting the United States to a lengthy evidentiary hearing, the District Court did exactly what *Harlow* suggested should be done.[8]

The Eighth Circuit's decision is squarely in conflict with the repeated and explicit holding of the Fifth Circuit that:

> A motion to dismiss for lack of jurisdiction may be decided by the district court on one of three bases: the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . [Where the Court dismisses based upon the complaint and the undisputed facts,] our review is limited to determining whether the district court's application of the law is correct and whether the facts are indeed undisputed.

Ynclan v. Department of Air Force, 943 F.2d 1388, 1390 (5th Cir. 1991). This holding has been consistently repeated by the Fifth Circuit for at least twenty years. *See, e.g., Bank One Texas v. U.S.*, 157 F.3d 397, 403 (5th Cir. 1998); *Barrera-*

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[8] As discussed above, the evidentiary hearing on the jurisdiction issue which the United States was seeking to avoid via its summary judgment request would have involved complex and substantial factual issues. Further, if this case could not be resolved on undisputed facts, resolution of the disputed jurisdictional facts would appear to be intertwined with the merits of the case and so would have required a full trial of the case. *Johnson v. Jones, supra.*

Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996); *Poindexter v. U.S.*, 777 F.2d 231, 235-236 (5th Cir. 1985); *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

The Court of Appeals for the District of Columbia has adopted the same standard. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Hohri v. U.S.*, 782 F.2d 227 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987).

Just like disputes on the merits, disputes regarding jurisdiction could be resolved on the pleadings alone, on the pleadings supplemented by undisputed facts, or on the pleadings supplemented by the Court's resolution of disputed facts. Unlike the Eighth Circuit, discussed *supra*, or the Tenth Circuit, discussed *infra*, the Fifth and District of Columbia Circuits permit the District Courts to have discretion to resolve jurisdictional disputes on any of these three bases. Permitting the District Court that discretion is implicitly in FRCP 12(d). The District of Columbia and Fifth Circuits then apply the scope of review which matches the scope of inquiry which the District Court chose.

Although their holdings are less explicit, the Second and Sixth Circuits, apply a rule similar to that in the Fifth and District of Columbia Circuits. *Zappia Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2nd Cir. 2000); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125 (6th Cir. 1996).

The Tenth Circuit has taken a position even more at odds with the Eighth Circuit. It limits the District Court's discretion by requiring that jurisdiction fact disputes can

only be resolved by an evidentiary hearing. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). The Ninth Circuit adopts a similar, but not identical approach. In that Circuit, the Court resolves any disputed jurisdictional facts against the party that moved to dismiss. *Dreier v. U.S.*, 106 F.3d 844 (9th Cir. 1996).

The conflicting positions of the Circuits is in need of resolution by this Court.

D. Had the Court of Appeals properly applied the summary judgment scope of review to the facts of this case, it would have reinstated the Tribe's claim that the United States owns the lakebed in trust for the Tribe.

The Court of Appeals' opinion is obviously dependant upon its contention that, on review of a motion for summary judgment on a jurisdictional issue, the Appellate Court does not need to abide by the summary judgment scope of review. *See, Spirit Lake Tribe* at 738-39 (without proof, majority assumes that the Tribe must have known of the 1971 quitclaim deed. The Court states "we have no doubt" and that the evidence "convinces us" that the Tribe knew or should have known of the deed); *Id.* at 738-39 (Contrary to reasonable inferences, the majority held that the quitclaim provided notice that the United States was violating its solemn treaty obligations to the Tribe by claiming the lakebed in fee. The quitclaim deed, App. F, transferred whatever interest the State had in a portion of the lakebed to the United States, but the deed did not specify whether the United States took the land in fee or in trust. More important, the quitclaim was

consistent with the United States' trust obligations because it benefitted the Tribe: it eliminated any potential state claim of ownership, and it furthered the Garrison project); *Spirit Lake Tribe* at 744 (1981 memo stated that the 1976 memo should "*no longer* be relied upon as stating the position of this Department on the ownership of the lakebed." The reasonable inference is that, prior to 1981, the 1976 memo had been relied upon and should have been relied upon. The majority explicitly held it did not have to apply that reasonable inference in favor of Tribe.); *Id.* at 744 (Even though the Court of Appeals previously *held* that a reasonable inference from the 1976 memo was that the United States acknowledged that it owned the lakebed in trust for the Tribe, *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1052-53 (8th Cir. 1990), the *Spirit Lake Tribe* Court refused to apply that reasonable inference.); *Id.* at 742-43 (Reasonable inference from fact that the Associate Solicitor issued his 1976 letter is that he had authority to issue the letter. Even though the Court admitted that no document showed whether or not the Associate Solicitor had authority or authorization to issue his opinion, the Court concluded that he did not have authorization to issue the letter.); *Id.* at 741 (The Court of Appeals further held, contrary to reasonable inferences, that, even though record does not show that Associate Solicitor informed Tribe that his 1976 letter was without effect, he must have informed Tribe of this "fact" in 1978.[9]); *Id.* at 742-43 (The Court states that one reason to

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[9] Not only does this portion of the Court of Appeal's opinion fail to draw reasonable inferences in favor of the Tribe, it also contains an obvious logical error. The Court held that, when the Associate Solicitor began work for the Tribe in 1978,

reject the Associate Solitor's opinion is that "the evidence in the case *suggests* that the government never took an affirmative act consistent with" the Associate Solicitor's opinion. The evidence and reasonable inferences therefrom are directly to the contrary. The government asserted the Associate Solicitor's opinion in subsequent litigation against the State of North Dakota, *Devils Lake Sioux Tribe* at 1053 n.6, and the reasonable inference from facts is that the Tribe and the United States relied upon the 1976 opinion when they settled an Indian Claims Commission suit. *Id.* at 1056).

As these and other reasonable inferences from the facts show, if the Court of Appeals had limited its scope of review to that commonly applicable to summary judgment motions, the Court would have reversed the District Court's grant of summary judgment on the jurisdictional issue.

Although the federal rules do not specifically authorize a motion for summary judgment in an attempt to avoid a lengthy evidentiary hearing on a jurisdictional issue, this Court should accept review and adopt the Fifth Circuits's well-reasoned and well-established holdings that if the District Court resolves a jurisdictional dispute on purportedly undisputed facts, the Court of Appeals must apply the scope of review applicable to all other summary judgment decisions.

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he must have informed the Tribe that he lacked authority to issue the 1976 letter. Even assuming that the Associate Solicitor told the Tribe that his 1976 opinion was issued without effect, the Tribe's case was filed less than twelve years after that alleged notice would have been provided.

CONCLUSION

For all of the reasons stated above, the Spirit Lake Tribe respectfully requests that this Court issue a writ of certiorari to review the important issues of law presented in this petition.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Eighth Circuit.

SPIRIT LAKE TRIBE, formerly known as Devils Lake Sioux Tribe, Appellant,

v.

State of NORTH DAKOTA, Garrison Diversion Conservancy District, United States of America, 101 Ranch, a North Dakota Partnership, Ruth Ward, Ralph Ward, Steve A. Ward, Imogene Christensen, Claire Engelhardt, Carlyle Brye, Arnold Yri, Vernyll Yri, Reginal Herman, Eileen Herman, Clifford M. Johnson, Melvin Diehl, Dustin King, Estate of Mabel Solheim, Estate of Minnie Johnston, Francis P. Schneider, Gloria Schneider, Appellees.

No. 00-1819.

Submitted: May 24, 2001.
Filed: Aug. 17, 2001.
Rehearing and Rehearing En Banc Denied Nov. 12, 2001.

Andrew M. Small, Bloomington, Minnesota, argued (Jonathan P. Decatosmith and *Jack C. Blair*, on the brief), for appellant.

Charles M. Carvell, Bismarck, North Dakota, argued, for appellees State of North Dakota and Garrison Diversion Conservancy District.

James C. Kilbourne, Washington, D.C., argued (*Lois J. Schiffer*, James Upton, *Katherine Hazard*, Jeffrey C. Dobbins, and Margot Zallen, on the brief), for appellee United States.

Before *BYE*, *BRIGHT*, and *MAGILL*, Circuit Judges.

BYE, Circuit Judge.

Devils Lake is a large, freshwater lake in northeastern North Dakota. The lake has no natural outlets, so its water level and size fluctuate considerably in response to changing climatic conditions. In the recent past, increased rainfall has slowly raised the water level and expanded the shores of the lake. The incremental expansion has swallowed whole towns, farms, and roads producing breathtaking results. The significant hydrological phenomenon at Devils Lake forms the backdrop for an equally momentous legal event – a long-simmering dispute concerning ownership of the lake itself.

The Spirit Lake Tribe resides on land that abuts the lake. The Tribe contends that an 1867 treaty gave it title to the lakebed, to be held in trust by the federal government. The Tribe filed the present lawsuit in 1986 seeking to declare its rights to the lake, to enjoin multiple defendants from using the lake, and to recover damages for various wrongful uses of the lake. The district court granted summary judgment in favor of all defendants, and the Tribe instituted the present appeal. We affirm the judgment of the district court with one exception. We vacate the portion of the summary judgment pertaining to the federal government, and remand the action to the district court to dismiss the government for lack of subject matter jurisdiction.

I

We recounted the factual underpinnings of this action in an earlier appeal. *Devils Lake Sioux Tribe v. State of N.D.*, 917 F.2d 1049, 1050-51 (8th Cir.1990) (*Devils Lake*

II). A brief overview of the facts at this juncture will serve to frame our discussion.

In an 1867 treaty, ancestors of the modern-day Tribe received vast lands in the Dakotas and Minnesota as a reward for their loyalty to the government during the Sioux Uprising of 1862. Article IV of that treaty established the Fort Totten Reservation for the use of the Tribe.

Article IV described the northern boundary of the Reservation as follows: "Beginning at the most easterly point of Devil's Lake; thence along the waters of said Lake to the most westerly point of the same. . . . " The phrase "thence along the waters" has been interpreted by various parties (at various points in time) to refer to the northern shore of the lake, the southern shore of the lake, and even a variety of lines drawn across the middle of Devils Lake. The proper interpretation is critical. For example, if the boundary is the northern shore, then the Reservation includes Devils Lake. Conversely, if the southern shore forms the boundary, then the lake lies outside the Reservation. *See Devils Lake II*, 917 F.2d at 1051.

On June 9, 1986, the Tribe filed this action to quiet title to Devils Lake. The Tribe named the federal government, the State of North Dakota, the Garrison Division Conservancy District (an arm of the State), and numerous private landowners as defendants. The Tribe contends that the 1867 treaty established the northern shore of Devils Lake as the northern boundary of its reservation, and that the government has held title to Devils Lake in trust for the Tribe for more than a century. At worst, the Tribe argues, the 1867 treaty is ambiguous. The Tribe

points out that courts traditionally resolve ambiguities in treaties in favor of Indian tribes. Under either approach, the Tribe asserts entitlement to Devils Lake.

The federal government disputes the Tribe's claim to the lake. The government claims that Devils Lake was not included in the 1867 treaty that formed the reservation. The government asserts that it continued to hold title to Devils Lake until 1889, when it conveyed the lake to the State of North Dakota at its statehood under the "equal footing" doctrine. *See Shively v. Bowlby,* 152 U.S. 1, 49-50, 14 S.Ct. 548, 38 L.Ed. 331 (1894) (explaining that the government cedes navigable waterways to States when they join the Union). According to the government, the State held complete title to Devils Lake until 1971. In 1971, the State quitclaimed title to a portion of the lake to the government to permit construction of a massive public works project called the Garrison Diversion Unit.

In 1989, the district court granted the federal government's motion for summary judgment. *Devils Lake Sioux Tribe v. State of N.D.,* 714 F.Supp. 1019 (D.N.D.1989) (*Devils Lake I*). The district court held that the Tribe had already resolved its claim to Devils Lake as part of a 1977 Indian Claims Commission (ICC) settlement. *Id.* at 1022-26. The Tribe appealed, and we reversed the district court's decision. *Devils Lake II,* 917 F.2d at 1056-57. We discerned factual disputes regarding the precise issues resolved in the 1977 ICC proceeding, and held that "[t]he record does not support a summary judgment on a theory that the 1977 settlement disposes of the Tribe's alleged rights. . . . [T]his issue requires further development on the merits." *Id.* at 1056.

The parties returned to the district court. They spent several years attempting to settle the case, but settlement talks failed to bear fruit. In 1998, the parties revived their case before the district court. After revival, court and counsel agreed to bifurcate proceedings. In the first phase, the federal government and the State would raise preliminary procedural and jurisdictional defenses. If the Tribe prevailed, the parties would then try the case on the merits and resolve the question of ownership.

The district court entertained the defendants' motions for summary judgment on the phase-one preliminary questions and heard extended argument. On January 24, 2000, the court issued a 17-page opinion granting summary judgment. The court held that the Tribe's suit against the federal government was time-barred. In addition, the court held that "issue preclusion"[1] prevented the Tribe from litigating the ownership of Devils Lake because the Tribe could have raised that issue (but did not) in a 1951 ICC suit. After dismissing the federal government, the court determined that the government was an indispensable party to the proceedings, and that the Tribe's suit against the State and the other defendants could not continue absent the government. *See* Fed.R.Civ.P. 19(b). Accordingly, the court entered a final judgment adverse to the Tribe.

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[1] It appears that the district court intended *claim* preclusion to serve as the basis for its conclusion. *See New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001) (distinguishing claim preclusion and issue preclusion).

II

The Quiet Title Act of 1972 (QTA), Pub.L. No. 92-562, 86 Stat. 1176, authorizes lawsuits against the federal government "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) (*Block I*). The Supreme Court has held that the QTA provides the only basis for an Indian plaintiff's quiet title action against the federal government. *United States v. Mottaz*, 476 U.S. 834, 841-44, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986).

The Tribe's suit against the federal government relies upon the QTA. We conclude, however, that QTA relief is not available because the Tribe failed to comply with the pertinent statute of limitations.

A

The QTA contains a generous 12-year statute of limitations, which provides that an "action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g). Because the QTA waives the government's sovereign immunity from suit, *Block I*, 461 U.S. at 280, 103 S.Ct. 1811, a plaintiff must comply with the limitations period to effectuate that waiver. Hence the QTA statute of limitations acts as a jurisdictional bar unlike most statutes of limitations, which are affirmative defenses. *See State of N.D. ex*

rel. Bd. of Univ. & Sch. Lands v. Block, 789 F.2d 1308, 1310 (8th Cir.1986) (*Block II*).

The 12-year limitations period begins when a plaintiff knows or should know of the government's adverse land claim. 28 U.S.C. § 2409a(g). This standard does not require the government to provide explicit notice of its claim. The government's claim need not be "clear and unambiguous." *Block II*, 789 F.2d at 1313. "Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Id.* (quoting *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir.1980)).

Further, the government's interest "need not amount to full legal title. . . . As long as the interest claimed is a 'cloud on title,' or a reasonable claim with a substantial basis, it constitutes a 'claim' for purposes of triggering the twelve-year statute of limitations." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir.1991). Even invalid government claims trigger the QTA limitations period. *See id.* Simply put, the limitations period is triggered when a landowner has reason to know that the government claims some type of adverse interest in that land. *See Patterson v. Buffalo Nat'l River*, 76 F.3d 221, 224 (8th Cir.1996).

B

The government argues that the Tribe "knew or should have known" of its claim to Devils Lake by at

least July 7, 1971.[2] On that date, the federal government acquired more than 62,000 acres of the lake from the State. The State deeded this sizeable chunk of Devils Lake to the government via quitclaim deed to assist the government in building the Garrison Diversion Project. The Project was managed by the Federal Bureau of Reclamation, and was designed to divert water from the Missouri River to irrigate arid lands, and stock municipal water supplies, in central and eastern North Dakota.

The government's 1971 land acquisition was widely reported by local media outlets, such as the *Devils Lake Journal* and the *Benton County Farmers Press*, and by larger organizations as well. The Tribe apparently knew of the government's land acquisition because a 1970 tribal resolution expressed concern about land ownership in view of "the coming Garrison Diversion Project." State App. 23-24. The Project itself was the single most important, visible public works project in North Dakota in the last half of the 20th century. The Tribe could hardly have turned a blind eye to its major details. *See generally In re Garrison Diversion Conservancy Dist.*, 144 N.W.2d 82, 88 (N.D.1966) (describing newspaper coverage of public hearings held in major cities in eastern North Dakota to discuss the contract and deed between the State and the government). Thus we have little doubt that the Tribe was aware of the Garrison Diversion Project generally, and the government's acquisition of a portion of the lake specifically.

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[2] The government also contends that a series of late 19th and early 20th century events notified the Tribe of its claim. We need not address that contention.

Even if the Tribe did not actually know that the government acquired title to a portion of the lake in 1971, the Tribe certainly *should* have known. As a matter of law, a quitclaim deed disgorging title to the United States places a landowner on notice and triggers the QTA statute of limitations. *State of Cal. ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir.1985). The quitclaim deed, coupled with evidence that the Tribe likely knew about the extent of the Garrison Diversion Project, convinces us that, in 1971, the Tribe "knew or should have known," 28 U.S.C. § 2409a(g), that the government claimed Devils Lake.

Because the Tribe learned of the federal government's claim to Devils Lake in 1971, the Tribe was required to file a QTA suit by 1983 to preserve the government's waiver of sovereign immunity. The Tribe actually filed its complaint in this action in June 1986, so the action is ostensibly barred by the 12-year statute of limitations.

C

In an effort to forestall the operation of the statute of limitations, the Tribe raises three counter-arguments. We discuss each in turn.

1

Assuming that its QTA claim accrued in 1971, the Tribe contends that the government abandoned its claim to Devils Lake in 1976. The Tribe believes that the government later reversed course in 1981, when it reasserted its

prior interest in the lake. The Tribe says that the government's 1981 claim was a new claim, which set in motion a new QTA statute of limitations. Thus the Tribe argues that its 1986 lawsuit is timely because the operative 12-year clock began in 1981.

We have little disagreement with the Tribe's presentation of the governing legal framework. Like any private citizen or corporate entity, the government may abandon its interest in land. If the government clearly and unequivocally abandons its interest, a district court loses jurisdiction over a pending QTA action. *See* 28 U.S.C. § 2409a(e). We believe that the principle espoused in § 2409a(e) applies, by analogy, to situations in which a plaintiff has not yet filed a QTA suit (though the limitations period has been triggered by adverse government conduct). In those situations, the government's outright abandonment effectively removes the cloud on a plaintiff's title and extinguishes his obligation to file a quiet title action within 12 years. If the government later reasserts an adverse claim, the reasserted claim is properly regarded as a new claim and a new 12-year period begins in which a plaintiff may file his QTA action against the government. *See Michel v. United States*, 65 F.3d 130, 132-33 (9th Cir.1995) (per curiam).

Applying these principles to the present case, the Tribe argues that a 1976 memorandum authored by Reid Peyton Chambers abandoned the government's interest in Devils Lake. Chambers served as the Associate Solicitor for the Division of Indian Affairs within the Department of the Interior in 1976. The Tribe's argument requires us to review the circumstances that gave rise to Chambers's memo in considerable detail.

As we have explained, *see supra* at 736, the State believes it acquired title to Devils Lake at statehood, in 1889, under the equal footing doctrine. At some point in the mid-1970s, the North Dakota Attorney General sought to establish the exact amount of territory in Devils Lake that the State had acquired in 1889. The North Dakota Attorney General requested an opinion on the matter from the Interior Department.

The North Dakota Attorney General's request was assigned to the Office of the Solicitor. The Solicitor's Office was (and still is) comprised of several divisions. Each division bore responsibility for varying aspects of the Department's broad mandate over domestic matters. *Cf. Federal Indian Law* 263 (U.S. Gov't Printing Office 1972). The Solicitor apparently directed the North Dakota Attorney General's request to a deputy in charge of one of the divisions – the Associate Solicitor for the Division of Energy & Resources.

The Associate Solicitor for the Division of Energy & Resources recognized that the North Dakota Attorney General's request implicated significant questions of tribal land ownership. Accordingly, he asked for assistance from his counterpart, Chambers, who then served as the Associate Solicitor for the Division of Indian Affairs. On June 21, 1976, Chambers responded. He addressed a reply memorandum to the Associate Solicitor for the Division of Energy & Resources in which he concluded that the State did not acquire Devils Lake in 1889 under the equal footing doctrine. Chambers wrote, "I am of the opinion that Devils Lake is . . . wholly within [the Reservation's] boundaries and the United States

holds title to the lakebed in trust for the Devils Lake Sioux Tribe." Tribe App. 74.

The Tribe argues that Chambers's view represented the position of the government in 1976. To prove the point, the Tribe cites a 1981 memorandum from the Solicitor of the Interior Department repudiating Chambers's conclusion. The 1981 memo advises the Assistant Attorney General of the United States that Chambers's memo "should no longer be relied upon as stating the position of [the Interior Department] on the ownership of the lakebed." Tribe App. 222. In sum, the Tribe posits that Chambers's memo abandoned the government's claim to Devils Lake.

The Tribe's argument suffers from six distinct flaws.

a

"In the first place, the Government cannot abandon property without congressional authorization." *Warren v. United States*, 234 F.3d 1331, 1338 (D.C.Cir.2000) (rejecting a plaintiff's QTA claim as time-barred) (citing Supreme Court decisions). The Property Clause of the Constitution invests Congress with plenary power to dispose of real property belonging to the United States. *See* U.S. Const. art. IV, § 3, cl. 2. "Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." *Royal Indemnity Co. v. United States*, 313 U.S. 289, 294-95, 61 S.Ct. 995, 85 L.Ed. 1361 (1941) (citations omitted).

It is undisputed that Congress never abandoned the government's 1971 claim to Devils Lake. Likewise, Associate Solicitor Chambers was a "subordinate officer," who lacked Congressional authorization to abandon a government land claim. *See* Op. Sol. M-35028, 60 I.D. 142, 147 (Mar. 4, 1948) (concluding that the Associate Solicitor for the Division of Indian Affairs "is not an 'Officer of the United States' in the Constitutional sense (Art. II, Sec. 2, Cl. 2), because he is not appointed through the procedure of nomination by the President and confirmation by the Senate.").

Our review of Interior Department policy confirms that Chambers lacked the authority to bind the government. In 1976, the governing regulations of the Solicitor's Office strictly forbade Associate Solicitors from signing documents involving "legal opinions of major importance." *Solicitor's Regulation 1* § 1(a) (reproduced in Aff. of Terrance C. Wiles, Feb. 12, 1988, Ex. G). Section 1(b) excluded Associate Solicitors from conveying the government's position "respecting legal questions" to persons outside the Department of Interior without first receiving approval from either the Solicitor or the Deputy Solicitor. *Id.* In addition, § 2(b)(2) of that same Regulation required an Associate Solicitor to obtain the concurrence of another Associate Solicitor when the matter in issue concerned two Divisions. *See id.*

These three regulations manifest Chambers's inability to declare unilaterally that his 1976 view was the position of the government. On a question of significant legal importance, such as the ownership of Devils Lake, Chambers had no authority to sign off. In communications with persons outside the Department involving the

government's position, Chambers needed the approval of the Solicitor or the Deputy Solicitor. Nothing in the record demonstrates that the Solicitor or Deputy Solicitor ever approved Chambers's conclusions or conveyed them to persons outside the Interior Department. Finally, Section 2(b)(2) applied to Chambers's memo because it was addressed to the Associate Solicitor for the Division of Energy & Resources, the official who initially requested Chambers's assistance. Chambers would have had to coordinate his views with those of the Associate Solicitor for the Division of Energy & Resources.

The Tribe was almost surely aware of the limitations on Chambers's authority. Chambers left his government post and formed his own law firm at the close of the Ford Administration. Remarkably, as a private attorney, Chambers discussed his 1976 memo with representatives of the Tribe in Washington in February 1978. *See* Aff. of Carl McKay ¶ 5 (Dec. 9, 1986) (McKay served as Chairman of the Tribe from 1976 to 1980). At the 1978 meeting, Chambers was accompanied by his law partner, Marvin Sonosky. The two met with Tribal officials to discuss the meaning of the 1976 memo less than two years after Chambers authored that memo.[3] Because Chambers is an accomplished attorney, we are confident that he understood the policies under which he operated while working in the Solicitor's office, and that he would have conveyed the extent of his limited authority to Tribal leaders. Of primary importance, the Tribe would have

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[3] The Tribe retained Chambers's law firm, and the firm eventually filed the 1986 complaint. The firm continued to represent the Tribe in this action until the late 1990s.

learned these facts well within the QTA's 12-year statute of limitations.

These points present insurmountable hurdles to the Tribe's argument that Chambers abandoned the government's ownership of Devils Lake in 1976.

b

Even if we assume for the sake of the Tribe's argument that Chambers possessed the authority to bind the government, Chambers's memo cannot be interpreted as an exercise of that authority. Chambers did not act in a manner that suggested he was establishing a position for the government, and thus we cannot accept the Tribe's conclusion that Chambers abandoned the government's claim to Devils Lake in these circumstances.

In the main, federal agencies bind the government in two ways. Agencies promulgate rules, subject to the notice-and-comment provisions of the Administrative Procedure Act. Agencies also adjudicate individual controversies, usually taking testimony and receiving evidence in the fashion of our courts. The Tribe has not attempted to argue that Chambers's memo was tantamount to agency rule-making or adjudication, nor could it reasonably maintain that position.

Aside from making rules and adjudicating cases, federal agencies also issue an array of informal advice in opinion letters, manuals, enforcement guidelines, and so forth. Unlike rules and adjudications, however, these informal agency pronouncements "lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct.

1655, 146 L.Ed.2d 621 (2000). Thus, even if Chambers's memo were likened to an opinion letter, the memo would not be law. In other words, the 1976 memo did not bind the government, nor establish the government's position, as to the ownership of Devils Lake.

Even if these types of *informal* agency pronouncements had legal force, the foregoing comparison between Chambers's memo and an informal opinion letter fails. The Office of the Solicitor (within the Interior Department) regularly issues opinion letters that are routinely published in the Federal Register. Chambers's memo bears no resemblance to such an opinion letter. Chambers's memo has not been published; indeed, his 1976 memo was never formally issued to the parties whose land rights are affected by its conclusions. Viewed on its own terms, Chambers's memo does not purport to establish a position binding the government. Chambers phrased his conclusion that the Tribe owned the lake as if it were his personal opinion, not the government's position. Had Chambers intended to expound the position of the government, he would likely have said so, rather than phrasing his conclusions in the fashion of a personal opinion. These factors strongly suggest that Chambers's memo is undeserving of consideration as informal agency action.[4]

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[4] We have cause to doubt that Chambers was well informed about the Devils Lake ownership controversy. It is remarkable that his memo – written just five years after the government purported to acquire a portion of the lake from the State – fails to mention, or even recognize the existence of, the 1971 quitclaim deed.

Because Chambers's memo was neither formal nor informal agency action (in the senses we have described above), we conclude that Chambers's memo could not have established the government's position in 1976. Our conclusion comports with common sense: intra-office memoranda do not bind the government. *Cf. Aulston v. United States,* 915 F.2d 584, 595 & n. 16 (10th Cir.1990) (disregarding internal memoranda in determining the position of the Interior Department). Chambers's 1976 memo quite simply lacked the legal force necessary to abandon the federal government's prior claim to Devils Lake. *Cf., e.g., Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1320-21 & n. 2 (D.C.Cir.1998) ("the views of FDA staff do not bind the agency's final decisionmaker").

c

Irrespective of Chambers's authority to make government policy, the government never adopted Chambers's views. The record in the present case does not reveal what use, if any, the Associate Solicitor for the Division of Energy & Resources made of Chambers's memo. Nor does the record disclose whether the Associate Solicitor for the Division of Energy & Resources even agreed with Chambers's views, or forwarded Chambers's conclusions to superiors in the Interior Department, or to the North Dakota Attorney General. The government never formally transmitted Chambers's memo to the Tribe, though the Tribe later obtained a copy through other channels. In short, the evidence in this case suggests that the government never took an affirmative act consistent with the conclusions in Chambers's memo.

Just as the dog's failure to bark revealed to Sherlock Holmes that there had never been a midnight intruder, *see* Arthur Conan Doyle, *The Adventure of Silver Blaze, The Strand Magazine,* December 1892, at 656-57, the government's failure to act emasculates the Tribe's argument that Chambers's memo had legal force. At oral argument, counsel for the government explained that the government would have notified the State of its change in legal position if it had agreed with Chambers's conclusions. As part of their agreement, the State and the government adopted an accounting procedure by which to compensate the government in the event the Tribe was later deemed to own the lake. Under the terms of that procedure, the government would be entitled to seek compensation from the State for "losing" the portion of Devils Lake it believed it had acquired in 1971. *See* Supp. Agreement Between The United States and the Garrison Diversion Conservancy Dist., attached as exhibit to Decl. of Darrell Krull (Oct. 20, 1986); *cf. Devils Lake II,* 917 F.2d at 1052 n. 5. It is undisputed that the government never sought compensation from the State. We find it highly implausible that the government would not have remedied its "loss" of Devils Lake under the terms of its express agreement with the State. We therefore conclude, like Holmes, that the government never changed its position, and never viewed Chambers's memo as abandoning its rights to Devils Lake.

d

The Tribe also raises the specter of the law-of-the-case doctrine, whose application we reject.

The Tribe contends that we have already determined that Chambers's memo represented the government's position. In the first appeal of this action, in 1990, we asserted without explanation that Chambers's memo was an "opinion" that represented the views of the Department of the Interior. *Devils Lake II*, 917 F.2d at 1052-53. Our assertion in the 1990 opinion was, however, immaterial to the resolution of the only issue presented in that appeal, which addressed the claim-preclusive effect of a 1977 ICC settlement. We are not obliged to accept our previous asseverations because the law-of-the-case doctrine does not extend to a prior opinion's recitation of facts not material to the disposition of that appeal. *See Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 462-63 (1st Cir.1992).

e

The Tribe also seeks to establish the government's abandonment of Devils Lake in 1976 by reference to a 1981 memo. In 1981, the Solicitor's Office of the Department of the Interior informed the Justice Department that "the June 21, 1976 memorandum of the Associate Solicitor, Indian Affairs, should no longer be relied upon as stating the position of this Department on the ownership of the lakebed." Tribe App. 222. The Tribe ventures that the author's use of the words "no longer" proves that, between 1976 and 1981, Chambers's memo had in fact been relied upon to state the government's position vis-a-vis Devils Lake.[5] We disagree.

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[5] The Tribe also relies on statements made by the government in the context of unrelated litigation in 1980 and

As we have explained in considerable detail above, Chambers's memo *did not* abandon the government's interest in Devils Lake. The Tribe is therefore left to argue that, in repudiating the 1976 memo, the 1981 memo retroactively revived the force of the 1976 memo. The Tribe says that the Solicitor's 1981 memo somehow altered the past, though it had never been reasonable to rely on Chambers's memo in the first place. The argument is plainly specious. The only reasonable interpretation of the 1981 memo is that the Solicitor sought to avoid any misunderstanding that Chambers's memo might have created because it reached a wider audience than the Solicitor's Regulations authorized. *See Solicitor's Regulation 1, supra,* at 11.

As concerns the 1981 memo, the Tribe is not entitled to the benefit of every favorable inference because, strictly speaking, we are not reviewing the propriety of summary judgment. Our present inquiry is directed at the historical facts undergirding the exercise of the district court's *jurisdiction,* in particular, whether the Tribe filed its QTA action within the governing 12-year statute of limitations. As to that jurisdictional inquiry, "no presumptive truthfulness attaches to the plaintiff's allegations," *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir.1990), and the Tribe, not the government, bears the burden of establishing the existence of subject matter jurisdiction, *see id.* We do not mean to suggest that we are presently engaged in fact-finding. The point is simply

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1981. These statements equivocate about ownership of the lake, and therefore cannot be interpreted to abandon the government's interest.

that we need not accept the force of the Tribe's less reasonable inference when a more reasonable explanation is readily available.

f

Even if we credited all the Tribe's arguments and inferences about the 1976 and 1981 memos, we could not conclude (as a legal matter) that the QTA statute of limitations stopped. As we explained above, the QTA limitations period begins to accrue when a plaintiff has reason to know of a cloud on his title. *See Richmond*, 945 F.2d at 769. The inescapable corollary to this principle is that the QTA limitations period does not stop when government action simply compounds a pre-existing cloud on title. Viewing the Tribe's position charitably, the 1976 and 1981 memos did no more than confirm the "1971 cloud" that already existed on the Tribe's putative title to Devils Lake.

We therefore conclude that the government did not abandon its interest in Devils Lake, nor concede the Tribe's ownership thereof, in Chambers's memorandum. The Tribe's reliance upon Chambers's memo as a reflection of change in the government's position was wholly unreasonable and legally untenable. As a consequence, the Tribe's 12-year QTA limitations period did not stop in 1976.

2

In its second counter-argument, the Tribe contends that the federal government has made different claims to

different portions of Devils Lake at different points in time. The Tribe therefore urges us not to treat the lake as an indivisible whole, but rather to apply multiple 12-year statutes of limitations to the respective portions of Devils Lake claimed at different times by the government. We rejected this very argument in *Block II*, and we likewise reject it in this case as well.

In *Block II*, we repudiated a tract-by-tract analysis of a QTA statute of limitations issue. We determined that when ownership of a disputed property would be resolved based on a single legal theory, notice of the government's claim to one tract constituted notice as to other tracts. "[T]he assertion by the United States of its claim to the specific tracts put the state on constructive notice of the United States' claim to the remainder of the riverbed tracts." *Block II*, 789 F.2d at 1314. We expressed our view that "the district court's refusal to extend the scope of the actual notice of the United States' claim to the *specific tracts* to constitute notice regarding its claim to *all* of its riparian riverbed interests constituted too narrow a view of the reach of § 2409a[g]." *Id.* at 1313 (emphasis added).

The Tribe's complaint avers that the government holds title to *all* of Devils Lake in trust for the Tribe: "This is an action brought by the Devils Lake Sioux Tribe . . . to establish that it is the beneficial owner of the bed of Devils Lake." Complaint ¶ 1. The parties dicker over the proper interpretation of a single sentence in an 1867 treaty. But all sides agree that this case presents the question of ownership of Devils Lake, not ownership of discrete tracts of Devils Lake. Because a single legal dispute animates this case, *Block II* disposes of the Tribe's

multiple-tract argument. *Block II* compels the conclusion that notice to the Tribe in 1971 that the government acquired a sizeable portion of Devils Lake via quitclaim deed constructively informed the Tribe of the government's adverse claim to the entire lake. 789 F.2d at 1313-14. We reject out of hand the Tribe's feeble efforts to distinguish *Block II*.

3

Finally, the Tribe compares the present title dispute to private trust law. The Tribe argues that it lacked notice of the government's *adverse* interest in Devils Lake in 1971 because it presumed that the government, as trustee, was acting in its best interests. The Tribe relies heavily upon *Loudner v. United States*, in which we held that an Indian beneficiary's duty to discover claims against the government qua trustee was "somewhat lessened," or "diminished," because the beneficiary was entitled to rely upon the good faith and expertise of the government. 108 F.3d 896, 901 (8th Cir.1997).

Loudner did not involve a QTA claim, and, in our view, *Loudner* does not apply to QTA suits. We must construe the QTA's waiver of sovereign immunity strictly. *See Block I*, 461 U.S. at 287, 103 S.Ct. 1811. Obviously, the principle of strict construction applies with full force to the elements of § 2409a(g), timeliness and accrual. We believe that a strict construction of the QTA is largely at odds with *Loudner*'s rule that an Indian plaintiff has a reduced responsibility to discover adverse government conduct. Furthermore, we note that in *Mottaz*, a QTA action involving an Indian plaintiff, the Supreme Court

made no mention of, or allusion to, the sort of reduced responsibility rule the Tribe advocates in the present case. 476 U.S. at 842-44, 106 S.Ct. 2224. Because a strict reading of the QTA would not entitle the Tribe to benefit from *Loudner*'s guidance, we find *Loudner* to be an unreliable guide in this case.

D

We agree with the district court that the Tribe exceeded the QTA statute of limitations. We part company with the district court only so far as the form of relief is concerned. Facing a time-barred claim, the district court entered summary judgment in favor of the government. We believe that the court's entry of summary judgment was improper because the QTA statute of limitations has a jurisdictional flavor. Plainly put, a district court lacks power and authority to entertain a time-barred QTA suit. The district court in this instance ought to have dismissed the government for lack of jurisdiction, rather than entering judgment in the government's favor.

Though we agree with the district court as to the ultimate resolution of the Tribe's claims against the government, we are obliged to vacate its judgment in part, and to remand the matter so that the court may properly dismiss the claims against the government for lack of jurisdiction.

There is no small difference between a dismissal and a summary judgment in this context. Under the terms of the district court's final judgment, the Tribe's claim to the

lake has been litigated and lost on the merits. The government would own Devils Lake. By instructing the district court to dismiss the Tribe's complaint for lack of jurisdiction, however, the ownership of Devils Lake remains an open question. "A dismissal pursuant to § 2409a[g] does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Block I*, 461 U.S. at 291-92, 103 S.Ct. 1811. The present controversy must await future legislative, or perhaps judicial, consideration.

III

We turn now to the Tribe's remaining claims against the State and various private parties who purport to own land along the shore of Devils Lake.

Unlike its claim against the federal government, the Tribe's remaining claims do not falter for lack of jurisdiction. Section 1362 of Title 28 provides an independent basis for federal jurisdiction over the Tribe's claims against the State and private landowners. That section provides that "[t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . , wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. We believe that the Tribe's claims against the State and the private landowners "arise under" federal law. The Tribe's claims against the State derive from the interpretation of the 1867 treaty and the

equal footing doctrine. The State believes that it owns the portion of Devils Lake that it did not deed to the federal government in 1971. The claims against the private landowners derive from federal land patents that the government may, or may not, have been empowered to issue. Hence § 1362 establishes a jurisdictional foothold for the Tribe's claims against the State and the private landowners.

The district court dismissed the Tribe's claims against the State and the private landowners after concluding that the federal government was an "indispensable" party in whose absence the action should not be maintained. *See* Fed.R.Civ.P. 19(b). Because the government was absent for jurisdictional reasons, the court dismissed the Tribe's suit due to its inability to join an indispensable party. *See* Fed.R.Civ.P. 12(h)(2).

Rule 19(b) authorizes a district court to exercise its equitable powers to dismiss an action if a party regarded as "indispensable" cannot be joined. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). We therefore review a district court's decision to dismiss an action for failure to join an indispensable party under the highly deferential abuse-of-discretion standard. *United States ex rel. Steele v. Turn Key Gaming, Inc.,* 135 F.3d 1249, 1251 (8th Cir.1998).

The question posed in the present case is whether the government's absence would render a judgment infirm,

defective, or unfairly prejudicial in some fashion. We must emphasize, at the outset, that the federal government and the Tribe possess the primary claims to Devils Lake in this litigation. Neither the State nor the private landowners can be expected to articulate the government's position on its behalf in its absence, so the prejudice to the government is obvious. If the Tribe were to prevail, and gain title to Devils Lake, the government's claim would be extinguished before it had ever raised its arguments on the merits. Moreover, the district court could not possibly craft an effective judgment in favor of the Tribe if the government would not be bound by that judgment due to its non-joinder.

Although a determination of indispensability in one case will seldom be completely dispositive in another,[6] our consideration of similar cases buttresses our view that the district court properly dismissed the Tribe's remaining claims. We note in particular two cases involving similar land claims brought by Indians against the federal government.

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[6] We reject the notion that the United States is an indispensable party to every case involving a dispute over Indian lands. *See Carlson v. Tulalip Tribes of Wash.*, 510 F.2d 1337, 1339 (9th Cir.1975) (noting that "the United States is a necessary party to any action in which the relief sought might interfere with its obligation to protect Indian lands against alienation."). Disputes over Indian lands arise in many forms (and can be initiated by many parties), and hence it is impossible to declare a *per se* rule that deems the government's joinder necessary in all such cases. *See, e.g., Sokaogon Chippewa Cmty. v. State of Wis.*, 879 F.2d 300, 304-305 (7th Cir.1989); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254-55 & n. 1 (9th Cir.1983).

In *Manypenny v. United States,* thirty-five enrolled members of the White Earth Band of Chippewa sued the federal government (including the Department of Interior and several of its employees), the State of Minnesota and its agents, three Minnesota counties, and an array of private landowners seeking to quiet title to several properties. 948 F.2d 1057 (8th Cir.1991). The district court dismissed the federal government because it had not waived its sovereign immunity. The court also dismissed the State after applying principles of Eleventh Amendment immunity. Finally, in the absence of the federal government, the court dismissed the remaining counties and private landowners under Rule 19(b). *Id.* at 1059. On appeal, we affirmed the district court's judgment that the members' inability to join the federal government was fatal to the maintenance of their quiet title action against other parties. *Id.* at 1067.

Another case presents a more striking analogy to the situation we face in the present case. In *Navajo Tribe of Indians v. State of N.M.,* the Navajo Tribe sued the federal government, the State of New Mexico, and various private landowners seeking to quiet title to thousands of acres allocated to the Navajo Tribe in a 1907 Executive Order. 809 F.2d 1455, 1462 (10th Cir.1987). A year after the Executive Order issued, the President issued a superseding Executive Order that appeared to revoke the 1907 grant. The Navajo Tribe challenged the validity of the superseding Executive Order in its 1982 lawsuit. The district court held that the federal government was immune from suit because the Tribe's claim fell within the exclusive jurisdiction of the ICC. The court then determined that the government was an indispensable

party to the Navajo Tribe's suit, and the court dismissed the remaining defendants under Rule 19(b). *See id.* at 1471-73. On appeal, the Tenth Circuit affirmed, reasoning that the government is an indispensable party when its own interest in land is plainly adverse to the interests of an Indian tribe. *Id.* at 1473.

Manypenny and *Navajo Tribe* illustrate that when the government claims an interest in land that squarely conflicts with the interest of a Tribe, the government's presence in litigation is nearly always required to assure the proper and effective adjudication of the dispute. We find that rationale to be persuasive in this case. As we explained above, the government and the Spirit Lake Tribe have articulated competing claims to Devils Lake. We therefore hold that the district court did not abuse its ample discretion in dismissing the Tribe's claims against the State and various private landowners due to its inability to join the federal government.

IV

For the reasons expressed above, we vacate the portion of the district court's judgment resolving the Tribe's claim against the United States. We remand the matter to enable the district court to dismiss the government as a defendant for lack of subject matter jurisdiction. In all other respects, we affirm the judgment of the district court.

BRIGHT, Circuit Judge, dissenting.

This case has been in litigation for fifteen years. In 1989, the district court rejected the Tribe's claims on the

merits, ruling that the government had paid for the lakebed. *Devils Lake I*, 714 F.Supp. 1019 (D.N.D.1989). We reversed, ruling that summary judgment was inappropriate since, as we stated, "The facts of the instant case suggest that the parties may have deliberately excluded the lakebed from the 1977 settlement because they considered it part of the Reservation. Admitting such a possibility, it would be counterintuitive to conclude as a matter of law that the parties intended the 1977 settlement to prevent the Tribe from asserting a subsequent claim to the lakebed." *Devils Lake II*, 917 F.2d 1049, 1056 (8th Cir.1990). The opinions in *Devils Lake I* and *Devils Lake II* assumed jurisdiction rested with the court to decide the merits.

Since that time, the parties negotiated but have failed to reach a settlement. Now, after fifteen years, the majority, in effect, states that there is *no* decision here, and the title of the Devils Lake lakebed remains in limbo. It tells the parties that the federal courts will not decide the title dispute. To me, it is analogous to two boxers who have fought for fifteen rounds only to hear the judges say "we decline to decide who wins and we send the fighters to box in another ring."

I respectfully dissent from the majority's opinion. The issue is when did the Tribe know or when should it have known that the United States claimed the lakebed of Devils Lake. In my view, the Tribe did not know and would not have known of the government's adverse claim until 1981, when the official position of the United States changed from its view that the Tribe owned the lakebed to a view of "no definite position" on title to the lakebed.

We commented on the official position of the United States in *Devils Lake II*, 917 F.2d 1049 (8th Cir.1990). This court determined that in 1976 the Department of the Interior issued an opinion, authored by an Associate Solicitor for Indian Affairs (Reid Peyton Chambers), which concluded that Devils Lake is wholly within the Reservation boundaries and the United States holds title to the lakebed in trust for the Tribe. *Id.* at 1052-53. The panel noted that the United States asserted this position in subsequent litigation, but ultimately abandoned it. *Id.* at 1053 n. 6. The panel concluded that the government's opinion was communicated to the Tribe later in 1976, but, in 1981, the government withdrew support from its 1976 opinion. *Id.* at 1054.

Associate Solicitor Chambers' letter stated as follows:

> By Memorandum dated February 13, 1976, you requested my assistance in determining the status of the title to the bed of Devils Lake in North Dakota. . . . [T]he Attorney General [of North Dakota] also requested an opinion as to the location of the "lakeside boundary" of the Fort Totten Sioux Indian Reservation which, in the Attorney General's view, is located "on the shore of Devils Lake."
>
> I am of the opinion that Devils Lake is not adjacent to the Fort Totten Sioux Indian Reservation but wholly within its boundaries and the United States holds title to the lakebed in trust for the Devils Lake Sioux Tribe.

Tribe App. at 74.

Therefore, the conveyance by the State of North Dakota in 1971 was a conveyance of whatever interest the

State possessed in the lakebed. The State may have thought it possessed title to the lakebed but title never had been confirmed to the State. The 1971 quitclaim may have been a move to satisfy the paper requirements for the Garrison Diversion Project, but binding the Tribe to it is another question altogether.

Subsequently, in a 1981 letter, the Department of the Interior advised the Land and Natural Resources Division of the Department of Justice on the question of whether the State acquired the bed of West Bay, Devils Lake as an incident of statehood. The Department saw

> no need to take a definitive position on the title to the entire lakebed at this time. If and when these issues arise in litigation of interest to the Tribe, they will be fully addressed by this Department. Meanwhile, the June 21, 1976 memorandum of the Associate Solicitor, Indian Affairs, should no longer be relied upon as stating the position of this Department on the ownership of the Lakebed.
>
> Tribe App. at 222.

The State's 1971 conveyance was not mentioned in the 1981 letter. Obviously, the federal government placed no importance upon this conveyance by North Dakota to the United States as shown by the utter lack of mention of the conveyance in the official correspondence regarding ownership of the lakebed.

In my judgment, upon review of these letters, it is clear the Tribe would not have received a definitive answer from the United States as to ownership of the lakebed if it had asked for direction in 1981. The United States did not know, nor had it determined, ownership of

the lakebed. As a result, applying the statute of limitations at this late stage is wrong. In essence, the Tribe did not know and could not know of an adverse claim to the lakebed by the United States, at any time prior to at least 1981 or later.

My position is supported by the cases in the Ninth Circuit, *Michel v. United States*, 65 F.3d 130 (9th Cir.1995) (per curiam), and *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir.1989), which treat analogous situations. The majority cites *Michel* for the proposition that the governing legal framework for this case is that when the government abandons its interest in land, a new twelve-year period begins in which a plaintiff may file a Quiet Title Act action against the government once the government reasserts an adverse claim. *See also Shultz*, 886 F.2d at 1161 ("[i]f the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later assertion is a new claim and the statute of limitations for an action based on that claim accrues when it is asserted.") However, the majority's assumption that the United States had property to abandon is misguided. The Tribe's "treaty or aboriginal title" to the lakebed was conceded for purposes of the United States' summary judgment motion, and the merits of that issue still have not yet been litigated. The majority does not reach the Tribe's alternative theory that the Tribe retained aboriginal title to the submerged lands, which cannot be extinguished without explicit action by Congress. *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 667-68, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

Applying the Ninth Circuit cases, the Department of Interior's 1981 letter reasserts a new status of the lakebed

because it indicated the status quo for the government's view of the ownership of the lakebed had changed from conviction that the Tribe owned it to saying that the government took no definitive position, i.e., it did not know. The statute of limitations should have begun, at the earliest, in 1981 or later. The record does not show prior to the lawsuit why or when the United States claimed ownership of the lakebed. The issue is not abandonment of rights by the government, or whether its 1976 position binds the government, about which the majority engages in mere conjecture as there is simply no testimony in the record to support these assumptions. The government was not giving anything up in its 1981 letter; rather, its position was that it didn't know. The United States, at no time prior to 1981, made any claim to the lakebed.

Indeed, as we have observed, the United States recognized that the Tribe could claim ownership.

I reject a *per se* rule of nonjusticiability that fails to consider adequately the Tribe's history of reliance on the government, as trustee, acting in its interests. Nor would I give credence to the claim that, prior to 1971, the Tribe understood the adverse character of the federal government's claim to Devils Lake.

An important question, as I see it, is whether there was any reason for the Tribe not to rely on its trust relationship with the federal government, when the State of North Dakota in 1971 quitclaimed more than 62,000 acres of the lake to the United States for the Garrison Diversion Project, and when interpreting the government's 1976 and 1981 memos regarding the reservation

boundaries.[7] Further, it is well-documented that the Tribe historically relied on the federal government to manage day-to-day Reservation affairs, and the Tribe had a right to think that the government was not cheating it out of ownership of the lakebed but would protect the Tribe's interests.

Where does this leave us? The undisputed facts show the Tribe filed its lawsuit in 1986, within twelve years of the government's "I don't know" pronouncement in 1981 that its 1976 memorandum "should no longer be relied upon as stating the position of this Department on the ownership of the lakebed." Thus, the Tribe's lawsuit is timely.

Unfortunately, as a result of the majority's conclusion that the court may properly dismiss the claims against the government for lack of jurisdiction, the ownership of the Devils Lake lakebed remains in limbo. The State of North Dakota, for example, stands on uncertain ground now as to the parts of the lake it did not quitclaim to the United States in 1971, and, in that respect, the district court abused its discretion in dismissing all of the Tribe's

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[7] The majority characterizes the dispute concerning ownership of the lakebed as "long-simmering." To the contrary, I believe we should take judicial notice that ownership of the lakebed was insignificant until recently, when the level of water rose and Devils Lake became vastly more important for its recreational benefits. The majority's unanchored interpretation of history ignores that all of this territory in what is now North Dakota belonged to native peoples before the arrival of white settlers. The majority implies that the Tribe's ancestors were getting more than they deserved in the 1867 Treaty because they were beneficiaries of the government's largesse.

claims against the State because the federal government is not an indispensable party as to all parts.

The majority substitutes a judgment of dismissal, based on conjecture and ambiguity rather than on the merits, in place of this court's duty to provide the parties their day in court. I respectfully dissent. Justice delayed is justice denied.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Spirit Lake Tribe, f/k/a
Devils Lake Sioux Tribe,

Plaintiff

Civil No. A2-86-87

v.

State of North Dakota, et al.

Defendants.

MEMORANDUM AND ORDER

(Filed Jan. 24, 2000)

Devils Lake Geologic and Historical Background:

To better understand the circumstances regarding the ownership history of Devils[1] Lake and its environs we must at least recognize the area's geographic and geologic history.

Devils Lake is located within a large, closed drainage basin in northeastern North Dakota. The water levels of the lake fluctuate to a great degree.[2]

The water level (October 1999) exceeds 1447+ feet above mean sea level (msl) and flows through the Jerusalem Outlet to Stump Lake. When the water level reaches

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[1] The word "Devils" is a perversion of the Indian word for "Spirit"

[2] The Jerusalem and Tolna Outlets in the Devils Lake Basin, North Dakota – ND Geologic Survey 1987, Page iv.

1457 feet msl, it will flow to the Sheyenne River through the Tolna Outlet.[3]

In the region bed rocks were deposited in a cretaceous seaway covering portions of North Dakota eighty-two to sixty-five million years ago. About three million years ago glaciers overrode and filled the valleys of the pre-glacial Cannon Ball River, incising deep valleys in soft shale and creating an irregular surface. It was this river, the pre-glacial Cannon Ball River, which carved out Devils Lake and Stump Lake with their numerous windings. The rivers also carved out a large "Spiritwood Aquifer," and much of Devils Lake lies over that aquifer.

The present day surface of the Devils Lake region is covered by glacial sediment deposited during the last three million years when large sections of what is now North Dakota were periodically covered by glacial drift.[4]

At the end of glaciation, approximately ten thousand years ago, the lack of glacial meltwater caused Glacial Lake Minnewaukan to shrink in size, creating the present day Devils Lake and Stump Lake systems. The water level in these lakes rose and fell in response to changes in climate, at times overflowing into the Cheyenne River through the natural outlets.[5]

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[3] ND Geologic Survey, Page iv

[4] Geologic Survey Page 6

[5] Geological Survey Page 8.

This is an action by the Spirit Lake Indian Tribe, formerly the Devils Lake Sioux Tribe, brought to quiet title to the bed of Devils Lake. The complaint was filed on June 9, 1986. The relief sought by the Indian plaintiffs was to establish that the Spirit Lake Sioux Tribe is the beneficial owner of the bed of Devils Lake with the legal title held by the United States in trust for the Tribe. The defendants are the State of North Dakota, the Garrison Diversion Conservancy District, the United States, and various individuals claiming an interest in the lake bed adverse to the plaintiff.

Jurisdiction is claimed under the Quiet Title Act, (QTA), 28 U.S.C 2409a, 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1362, (Indian Tribes). Defendant United States has moved for summary judgment alleging that (1) the 12 year statute of limitations included in 28 U.S.C. 2409a(g) had run; (2) that the tribe is precluded from bringing this action because they knew, or should have known before 1951 of the adverse claims of the United States and should have included this claim in the action they brought that year before the Indian Claims Commission (ICC), and (3) that this action is barred because it was a part of the settlement made in the 1951 ICC action.

The District Court granted the motion on the grounds that the settlement of the ICC action included the question of the ownership of the lake bed. *Devils Lake Sioux Tribe v. State of North Dakota,* 714 F.Supp 1019 (D.N.D. 1989). The Eighth Circuit Court of Appeals reversed and remanded. *Devils Lake Sioux Tribe v. State of North Dakota,* 917 F.2d 1049 (8th Cir. 1990). That court held that an affidavit submitted by the attorney, who represented the tribe in the ICC action to the effect that the question of

the lake bed was not a part of the discussions at that time, created a question of fact and granting summary judgment was inappropriate.

This action was filed on June 9, 1986, thus, if the tribal elders knew or should have known of the adverse claims on or before June 9, 1974 the action is time barred. A party moving for summary judgment must show that the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Webb v. Lawrence County*, 144 F.3d 1131, 1134 (8th Cir.1998). Once the moving party has made this showing, the nonmoving party must go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue of material fact. Fed.R.Civ.P. 56(e); *Celotex v. Catrett*, 106 S.Ct. 2548, 2553 (1986). As to materiality . . . [o]nly disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2510 (1986).

The dispute here is engendered by the description of the reservation boundaries in the Treaty of 1867 which starts at the eastern point of Devils Lake and continues "along the waters of said lake". It may well be that the Indians who entered into that treaty thought that the lake was contained within the boundaries of their reservation. They had been driven westward from what is now Minnesota by the immigration driven expansion by the whites and were unsophisticated, spoke no English and had no formal education. However that may have been in

1867, what is at issue here is not what they thought at the time, but what they learned or should have learned since that time.

TRUST STATUS OF LAKE BED

The Tribe contends that the United States holds the lake bed in trust for the Tribe and that, under the doctrine enunciated in *Loudner v. United States*, 108 F.3d 896 (8th Cir. 1997), the Government had to actually inform them that it was claiming an adverse interest in that property to trigger the running of the statute of limitations. That would only be true if the lake bed is held in trust, so the court must first determine if the lake bed is held in trust. An analysis of that question starts with the determination of the navigability of Devils Lake.

NAVIGABILITY

A lake is navigable in law if it is navigable in fact. *United States v. Holt State Bank*, 46 S.Ct 197, (1926). The determination that must be made here is as to the lake's status in 1889, the year North Dakota achieved statehood. Exhibit 225, Frank E. Vyzralek, *Powered Boat Navigation on Devils Lake* (1986), points out what is common knowledge to North Dakotans, that is that there were a number of good size steamboats carrying on commercial navigation on Devils Lake in 1889, Captain E. E. Heerman owned three of these boats, the most famous of which was the Minnie H. Therefore, it appears that the lake was navigated in fact, and so it must be regarded as navigable in law when North Dakota achieved statehood.

Further, that lake has been declared navigable in a number of legal proceedings. It was found so by the North Dakota Supreme Court in the *Matter of the Ownership of Bed of Devils Lake,* 423 N.W.2d 141 (N.D. 1988), and in *Rutten v. State,* 93 N.W.2d 796 (N.D. 1958); by the United States District Court in *Devils Lake Sioux Tribe v. State of North Dakota,* supra, and in *101 Ranch v. United States,* 714 F.Supp 1005 (DN.D. 1988); by the Eighth Circuit Court of Appeals in *Devils Lake Sioux Tribe,* supra, and *101 Ranch v. United States,* 905 F.2d 180 (8th Cir. 1990); by the District of Columbia Court of Appeals in *National Wildlife Federation v. Alexander,* 613 F.2d 1054 (DC Cir. 1979).

GRANT OF LAKE BED

The Tribe contends that the reservation boundary should be the north shore of the lake, making the entire lake a part of the reservation which is held by the United States in trust for the Tribe. In order for the lake to be a part of the reservation, the United States had to have granted it to the Tribe in the Treaty of 1867. The United States claims that the boundary is the south shore and that it did not grant the lake and lake bed to the Tribe when creating the reservation.

Being navigable, there is a strong presumption that the United States retained the bed of Devils Lake when the reservation was created so that it could pass to the state at statehood under the "equal footing" doctrine. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845); *Shively v. Bowlby,* 14 S.Ct. 548 (1894); *United States v. Holt State Bank,* supra; *Montana v. United States,* 101 S.Ct 1245 (1981); *Utah*

Div. of State Lands v. United States, 107 S.Ct. 2318 (1987); *Idaho v. Coeur d'Alene Tribe of Idaho,* 117 S.Ct 2028 (1997). As the Supreme Court pointed out in those cases, this court must start with a strong presumption that the land under navigable water was retained to be given to the state at statehood and against conveyance by the United States and must not infer such a conveyance unless the intention was definitely declared in clear or unequivocal special words and was done for some national purpose.

The reservation was created by the Treaty of 1867, and the boundaries of the reservation were described as:

> Beginning at the most easterly point of Devil's lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne river; thence down said river to a point opposite the lower end of Aspen island; and thence on a direct line to the place of beginning. *(See appendix 1).*

This certainly falls far short of being a clear declaration of conveyance of the bed of the lake. The only mention of the lake in the treaty is that the line between the most easterly point on the lake and the most westerly point is "thence along the waters". This certainly lacks the specificity needed to be "unequivocal". This court finds that the Treaty of 1867 did not convey the bed of Devils Lake to the Tribe. Therefore, it is not being held in trust and the statute of limitations would be triggered by any notice that a reasonable person would interpret to mean that there was a competing claim to the lake.

STATUTE OF LIMITATIONS

By passing the Quiet Title Act Congress intended to create a waiver of sovereign immunity for a specified purpose and for a specified time. If that time has been exceeded, this court is without jurisdiction to decide any part of the action. *Block v. North Dakota ex. rel. Bd. of University and School Lands,* 103 S.Ct 1811 (1983), *Knapp v. United States,* 636 F.2d 279 (10th Cir. 1980), *Vincent Murphy Chevrolet v. United States,* 766 F.2d 449 (10th Cir, 1985). Since this is a waiver by the sovereign, it must be strictly construed in favor of the sovereign. *Knapp and Vincent Murphy,* supra. Therefore, unless the plaintiff has clearly shown that its cause of action did not accrue until after June 9, 1974 – twelve years before the action was filed – the action must be found to be time barred and dismissed. The language of 28 U.S.C. § 2409a(g) is clear, and when conditions, such as a statute of limitations are placed on laws waiving the immunity of the United States, those conditions must be strictly observed and exceptions thereto are not to be lightly implied. *Vincent Murphy Chevrolet v. United States,* supra, citing *Block v. North Dakota,* supra.

Plaintiff claims that it had no knowledge of any adverse claim to the lake bed by the United States until the United States filed its answer in this action. (Pl. Brief, docket # 142. p. 2, et seq.) The Court is constrained to note that it finds this statement difficult to accept in light of the fact that the Tribe initiated the action and named the United States as a defendant. If the plaintiff had no knowledge of a claim by the United States, it would be in jeopardy of Rule 11 sanctions.

However, the question remains, when did the Tribal Council members learn, or when should they have learned, of the government's claims to the bed of Devils Lake? It is a landowner's duty to use reasonable diligence in exerting dominion over his land. The ownership of property carries the concomitant responsibility of being informed of events and conditions that occur on the property. Any knowledge reasonably obtainable by a prudent owner will be imputed to him. *Fulcher v. United States*, 696 F.2d 1073 (4th Cir. 1982). In that case the court imputed knowledge to Fulcher even though the land was in North Carolina and Fulcher resided in California.

The Court has reviewed the exhibits and appendices filed with the brief of the United States and sees them as giving notice to a reasonably diligent Tribal Council in a number of ways.

SETTLEMENT

First, there was the settlement of land below the water level that Devils Lake had at the time of the making of the treaty in 1867. There are 153 homestead filings on property in the lake bed before the court, many of which describe improvements on the homesteads. Exh. 43-195. They were there to see. Plaintiff contends that it did not understand what was going on, not being educated and not understanding English. That may have been true at the beginning of settlement, but the farmsteads stayed there, the Indian School was established about 1874 – during the 1901 negotiations Inspector McLaughlin commented that the school had been there for 27 years – (App. E., ¶ 25), and the population of the reservation

became English speaking, literate, and most developed a sophisticated understanding. Indeed, when 216 male adult tribal members signed the treaty negotiated by Inspector McLaughlin in 1901, 94 (43.5%) signed their names, indicating they had had some education. (Appendix E, p. 30-31). Plaintiffs submitted nothing to refute this evidence, relying solely on a general denial.

1901 TREATY NEGOTIATIONS

The minutes of those negotiations, *Appendix E*, clearly show that at that time the Indians were aware that the United States had claimed the lake bed. Inspector McLaughlin stated in his report which accompanied the treaty to Washington, "I also clearly told them that they never had any recognized claim . . . to the two former islands referred to. . . . (Graham's and Rock Islands)". (App. E, p. 10). At the negotiations Little Fish stated, "Even Rock Island was taken away from us by Congressional action". (App. E, p. 16) Later in the negotiations McLaughlin told those assembled, "Your reservation lines as defined by [the 1867] Treaty never included Rock Island and Grahams Island", and "You will never realize a cent more . . . from the two islands in Devils Lake". (App. E, p. 24) Thus, those present were certainly put on notice at that time that the United States was claiming the lake bed. Plaintiff has submitted nothing to refute this evidence, relying solely on a general denial.

MAPS

Another manner in which the Tribe could have or should have had notice is in the many maps of the

reservation that were produced between 1876 and 1974. The court notes that 20 such maps were produced in that period which show the reservation boundary to be the South shore of Devils Lake. Especially notable in this group is Exhibit 312, a map produced in 1963 by the Aberdeen area office of the Bureau of Indian Affairs (BIA), and is a key map to six other maps showing the ownership of land within the Fort Totten Indian Reservation. This map shows the reservation south of the lake, with the south shore as the north boundary. The map doesn't even show the north shore. This map must have been available to Tribal Council members, and from its portrayal of the boundaries was such notice the United States held that the south shore was the boundary. Another pertinent piece of evidence that the tribal leaders should have known this fact is Exhibit 311, a BIA highway map of the reservation that was prepared in 1938 which only goes up to the lake, and does not show the north shore at all. Plaintiff has submitted nothing to refute this evidence, relying solely on general denial.

ANNUAL REPORTS

Exhibits 200 through 224 are annual reports by the Indian Agent at the Devils Lake Agency for the years from 1876 through 1903. Many of them contain descriptions of the reservation such as "lying along the south shore of Devil's Lake, (Exh. 202), "Devil's Lake, 35 miles long, on the north" (Exh. 203), "lying along the southern shore of Devil's Lake" (Exh. 204), lies along the southern shore of Devil's Lake" (Exh. 205), "on the south of Devil's Lake" (Exh. 207), "The reservation lies south of Devil's Lake" (Exh. 211), "Devil's Lake Reservation lies south of

Devil's Lake" (Exh. 212), "on the south shore of Devil's Lake" (Exh. 213, "on the south shore of Devil's Lake" (Exh. 214), "on the south shore of Devil's Lake, which forms its northern boundary" (Exh. 215), "on the south shore of Devil's Lake" (Exh. 223), "The lake is the north boundary" (Exh. 224). These reports show that the government's agents during this period, at least five in number, held that the south shore was the northern boundary of the reservation. Appendix E, the McLaughlin report on the 1901 treaty, shows that some form of tribal council was active at that time. Appendix E, on page 32 recites that 61 persons were admitted by the council to allow them to receive allotments. Certainly the council would have worked with the agent frequently enough so that they should have known his views about the location of the north boundary. Plaintiff has submitted nothing to refute this evidence, relying solely on general denial.

ICC EVIDENCE

In 1951 the Tribe filed claims with the Indian Claims Commission (ICC) which heard those claims in 1971 and issued 2 opinions, one in 1973, (App. G) and one in 1975, (App. U). Exhibits in this action include four of the exhibits presented to the ICC. They are exhibits 249, 331, 332 and 333. Two of these items are significant in regards to the question before the court. Exhibit 331 is a United States Geological Survey 1:250,000 map of the area on which the reservation boundaries have been drawn in and which shows the area that the 1951 claim included. The shown north border of the reservation is the south shore of Devils Lake. Exhibit 332 is an appraisal of the

lands in the claims and contains a small map which very clearly shows the south shore of the lake as the north boundary of the reservation. *(See appendix 2).* Tribal officials can hardly make a credible claim they did not know at that time that the lake was not in the reservation when the evidence in an action in which they were involved contains material to the contrary. Plaintiff has submitted nothing to refute this evidence, relying solely on general denial.

PETITIONS

In 1965 and in 1970 the Tribal Council petitioned the Department of Interior's Office of the Solicitor to get a determination of the ownership of the relicted land, (Exhs. 273 & 280). Clearly they are referring to the land on the south shore as the resolution states, "with the coming Garrison Diversion Project the waters of Devils Lake will become stabilized at a level below the meander line of the lake as established by the General Land Office survey, and the entity proving ownership of land lying between said stabilized water level and the meander line will control access to the entire south **side** of Devils Lake," (Exh. 280 Emphasis added). This shows the court that, first, the Tribe was aware of the coming Garrison project in 1970, which they have denied, and, second, the Tribe was limiting its claim to the south shore. While the latter point is interesting, it is not pertinent to the question, but the first point clearly shows that the Tribal Council was aware that the government had claims on the lake bed. Plaintiff has submitted nothing to refute this evidence, relying solely on general denial.

MANAGEMENT

Since their inception as state agencies, the North Dakota State Water Commission has exercised jurisdiction over the water of the lake, and the North Dakota Game and Fish Department has exercised jurisdiction of the fish and game in the lake. The court has been shown no evidence that the Tribe has ever tried to exercise such jurisdiction as do some tribes on their reservation.

BUREAU OF RECLAMATION ACTIVITY

In 1950 the Bureau of Reclamation constructed a large transmission line through the main body of the lake. The line consists of huge steel towers on concrete bases which can be seen from Fort Totten.

In addition, The Bureau spent many years planning Garrison Diversion Unit (GDU) and received a great deal of publicity about the project. Still, the Tribe denies it knew anything about that project. As noted earlier, the 1970 Tribal Resolution specifically referred to the fact that the lake would be stabilized by that project. In addition, The Draft Environmental Study for GDU was sent out for comment in 1973. (Exh. 327). The letter attached to that statement states, "The Indian tribes at Fort Totten . . . have been contacted in regard to how they will be affected by the Garrison Diversion Unit. They have received a copy of the Draft Environmental Statement".

The letter further states, "On July 23, 1973, the Devils Lake Sioux Tribe advised the Secretary of the Interior of its support of the Garrison Diversion Unit, stating '. . . the overwhelming advantages of the Garrison Diversion

in the Devils Lake area would be of great benefit not only to our tribe but for others in North Dakota as well' ". (Exh. 327, Unnumbered page following p. IX 20).

SUMMARY

The standard that requires the Court to closely scrutinize any claimed waiver of immunity also requires the courts to narrowly define the phrase "should have known". *United States v. Mottaz,* 106 S.Ct. 2224 (1986); (Owner should have known when she got notice the United States did not recognize her title.); *Richmond, Fredricksburg and Potomac Railroad Company,* 945 F.2d 765 (4th Cir. 1991), (Should have known based on a condition in a 1938 deed); *Fulcher v. United States,* supra; (California owner of North Carolina land should have known because he failed to exercise reasonable diligence to inform himself of the state and condition of his property); *Park County, Montana v. United States,* 626 F.2d 718 (9th Cir. 1980), (County board should have known based on placement of federal sign on a forest trail over 40 miles from either county seat); *State of North Dakota, ex rel.Board of University and School Lands v. Block,* 789 F.2d 1308 (8th Cir. 1986), (Should have known the United States claimed all minerals under river bed because they had clearly claimed some). Thus it is seen that it does not require actual notice, or a lot of evidence to place one on notice of the adverse claim.

Any of the actions noted above, settlement of the lake bed, 1901 negotiations, the many maps showing the south shore as the boundary, the annual reports of the Indian Agent, the maps used in the ICC claim, the 1970 petition,

management of the lake by the state or the Bureau of Reclamation activity, is sufficient notice to have put a reasonable prudent Tribal Council member on notice that there were competing claims to the lake bed. Thus the statute of limitations had passed before this action was started and the court is without jurisdiction to consider the merits of the claim.

ISSUE PRECLUSION

The government claims that this suit is also barred by the doctrine of issue preclusion because the Tribe should have brought this claim at the time it brought its claim to the Indian Claims Commission in 1951. The Tribe responds that the ICC would not have had jurisdiction to hear this claim, and that both the District Court and the Eighth Circuit have so held. Having carefully re-read both opinions the Court does not find any such holding in either. Indeed, just the opposite appears to have been the law. *United States v. Dann,* 105 S.Ct. 1058 (1985); *White Mountain Apache Tribe v. Hodel,* 784 F.2d 921 (9th Cir. 1986); *Oglala Sioux Tribe v. United States,* 650 F.2d 140 (8th Cir. 1981).

The Tribe responds to this claim the same way it responded to the issue of the statute of limitations in denying that its members knew, or should have known, that the United States was making adverse claims to the lake. A review of the evidence discussed regarding the statute of limitations shows that there was much evidence available prior to 1951 to put the Tribe on notice of such claims. The settlement of parts of the lake, the 1901 negotiations, many of the maps of the reservation, the

annual reports of the Indian Agent, and the management of the fish and game in the lake all preceded the 1951 ICC action and any one of these is sufficient to have put the Tribal Council on notice that there were rival claims to the lake bed. Thus, this issue should have been presented to the ICC in 1951 and the Tribe is precluded from presenting it to this court.

It is ordered that the Motion for Summary Judgment is GRANTED, and the United States is dismissed as a defendant in this action.

11TH AMENDMENT

North Dakota and the Conservancy District have pled 11th Amendment immunity in their answers, and the court is of the opinion that they would be entitled to such immunity. See *Seminole Tribe of Florida v. Florida,* 116 S.Ct 1114 (1996); *Bradley v. Arkansas Dept. of Education,* 189 F.3d 745, (8th Cir. 1999); *Kimel v. State Board of Regents,* 139 F.3d 1426 (11th Cir. 1998). Congress may enact a statute that abrogates the State's 11th Amendment immunity, but to do so Congress must make it obvious from a clear legislative statement. *Seminole Tribe v. Florida,* supra. There is no mention of 11th Amendment immunity in the QTA thus, Congress did not intend that act to abrogate immunity under the 11th Amendment.

NECESSARY PARTIES

The state agencies and the individual defendants claim that the United States is a necessary party to this

action and if it is dismissed, the action should be dismissed as to all defendants. Federal Rule of Civil Procedure 19(b) states;

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity or good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable, the factors to be considered by the court include; **first**, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; **second**, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; **third**, whether a judgment rendered in the person's absence will be adequate; **fourth**, whether the plaintiff will have an adequate remedy if the action is issued for nonjoinder.

Fed.R.Civ.P. 19(b) (emphasis added).

The essence of the Tribe's claim is that the United States improperly conveyed title to reservation lands held in trust for the Tribe to the state of North Dakota and various third parties in violation of its fiduciary obligations. As set forth above, the Court finds that it lacks subject matter jurisdiction over the United States. Therefore, the Court must determine whether the United States is an indispensable party pursuant to Rule 19(b), Federal Rules of Civil Procedure. If the answer is yes, the action against the remaining defendants must be dismissed.

The United States argues that this case is directly analogous to *Navaho Tribe of Indians v. State of New Mexico,*

809 F.2d 1455 (10th Cir. 1987), quoting "[t]he Tribe's remaining claims against the remaining defendants are, in reality, challenges to the validity of the transactions by which the United States assumed title to the subject land." *Navaho* at 1471. First, there is no question that the first prong of Rule 19(b) a judgment rendered in the absence of the United States would be prejudicial to the United States. Because prejudice to the United States is clear, the Court need not consider prejudice to the other parties. A finding in the United States' absence that Article IV of the Treaty of 1867 included the lake bed of Devils Lake in the grant of land to the Tribe undoubtedly prejudices the United States. Second, this Court sees no way to word a judgment or shape the possible relief to avoid such prejudice to the United States. In this case, title to the lake bed must be decided entirely or not at all. *Navaho* at 1472. Third, any judgment rendered without the presence of the United States would be totally inadequate. Fourth, the Tribe does not have a proper remedy, in fact it has no remedy. The fourth factor is not dispositive, rather Rule 19(b) must be applied in "equity and good conscience" by the district court.

In *Navaho,* the Tenth Circuit examined the application of Rule 19(b) to a claim that was barred by the ICCA and that is analogous to the Tribe's current claim. The Tenth Circuit in *Navaho* held that the United States was an indispensable party. Further, the Eighth Circuit's decision in *Oglala Sioux Tribe v. Homestake Mining Company,* 722 F.2d 1407 (8th Cir. 1983) stands for the proposition that the Tribe may not avoid the exclusivity bar of the Indian Claims Commission Act by seeking title, possession and damages from successors in interest of the United States,

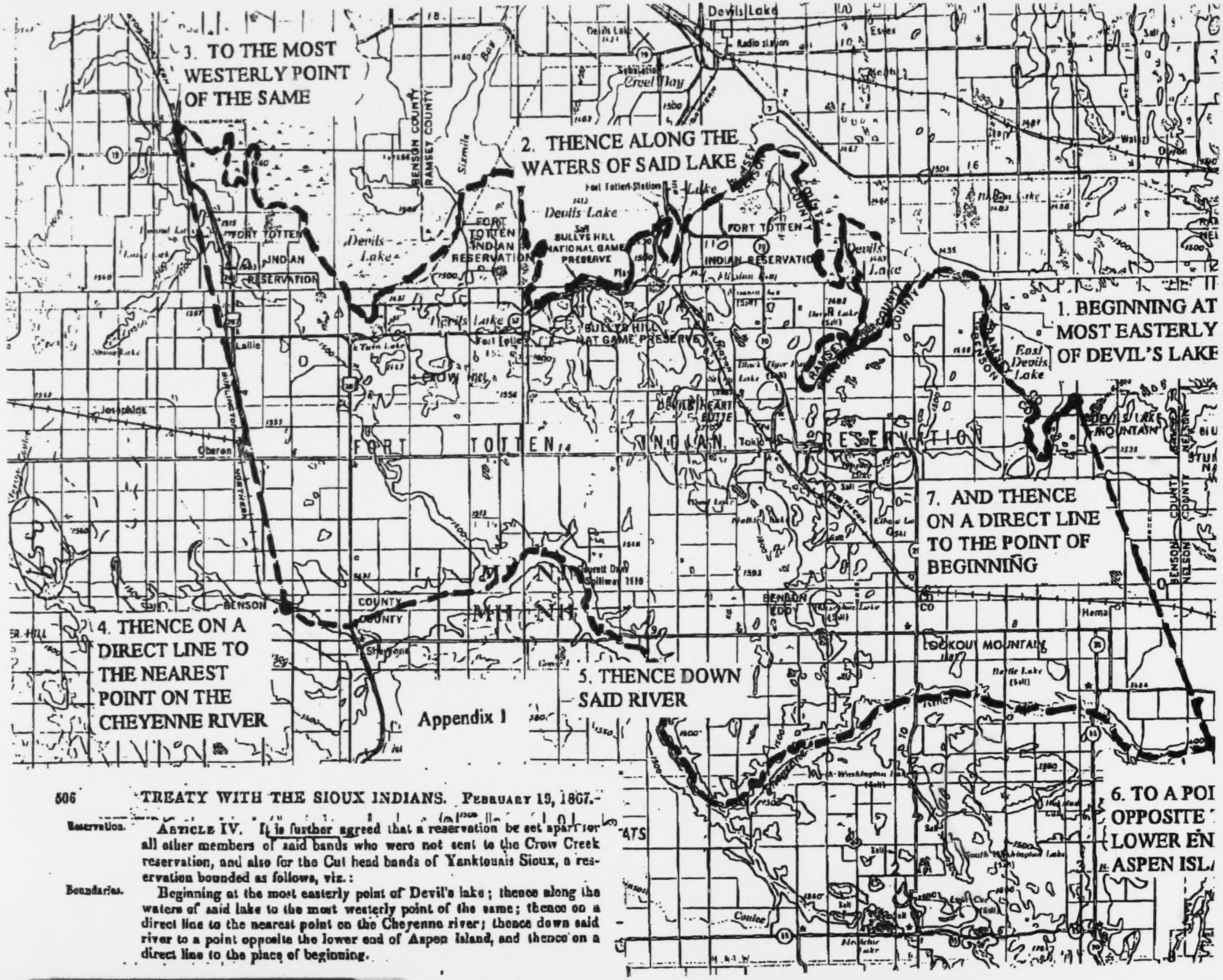
where suit against the federal government is barred. Therefore, application of the factors set forth in Rule 19(b) and the case law cited lead this Court to conclude that the United States is an indispensable party in this action.

THEREFORE,

IT IS ORDERED that the United States Motion for Summary Judgment (Dkt. 116) is **GRANTED**, and that a judgment of dismissal be entered as to all named defendants in the plaintiff's complaint.

Dated this 24 day of Jan., 2000.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court



506 TREATY WITH THE SIOUX INDIANS. FEBRUARY 19, 1867.

Reservation. ARTICLE IV. It is further agreed that a reservation be set apart for all other members of said bands who were not sent to the Crow Creek reservation, and also for the Cut head bands of Yanktonais Sioux, a reservation bounded as follows, viz.:

Boundaries. Beginning at the most easterly point of Devil's lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne river; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

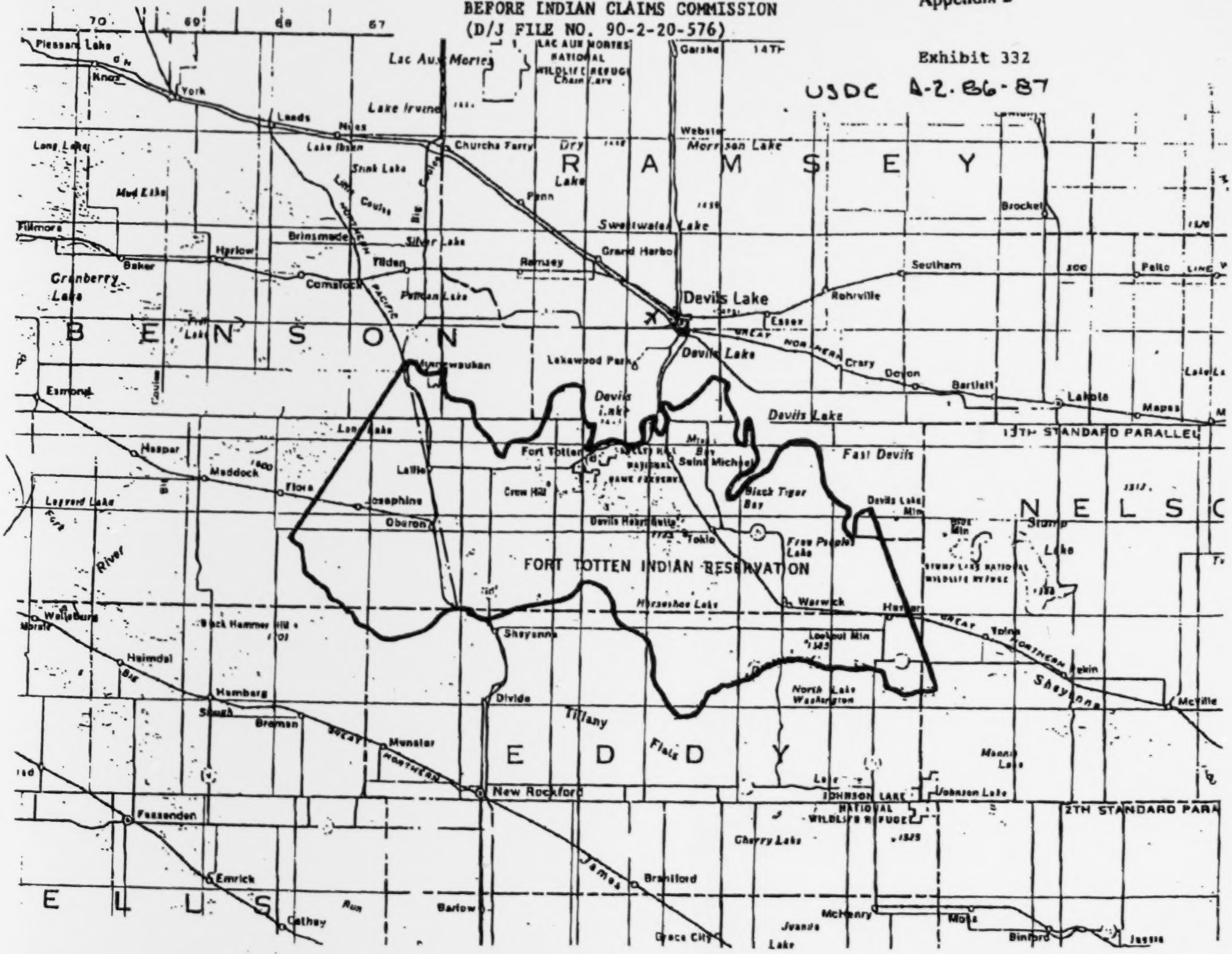
BEST AVAILABLE COPY

LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA ET AL
DOCKET NO. 363D SECOND CLAIM
BEFORE INDIAN CLAIMS COMMISSION
(D/J FILE NO. 90-2-20-576)

Appendix 2

Exhibit 332

USDC A-2-86-87


BENSON
RAMSEY
NELSON
EDDY
ELLIS
FORT TOTTEN INDIAN RESERVATION
Devils Lake
Lake Irvine
Lac Aux Mories
Sweetwater Lake
Grand Harbor
Silver Lake
Cranberry Lake
Esmond
Harlow
Fillmore
Baker
Tilden
Ramsey
Comstock
Pelican Lake
Lakewood Park
Crary
Devon
Bartlett
Lakota
Devils Lake
Fort Totten
Saint Michael
Black Tiger Bay
Fort Totten
Crew Hill
Oberon
Josephine
Flora
Maddock
Hespar
Leeds
York
Knox
Pleasant Lake
Webster
Morrison Lake
Brocket
Devils Lake
Esmond
Rohrville
Seutham
Petto
Mapes
Devils Lake
Devils Lake
Devils Lake
Fast Devils
Devils Lake
Devils Lake
Devils Lake

APPENDIX C

United States Court of Appeals,
Eighth Circuit.

DEVILS LAKE SIOUX TRIBE, Appellant,

v.

STATE OF NORTH DAKOTA; The Garrison Diversion Conservancy District; the United States of America; 101 Ranch, a North Dakota Partnership; Steve Ward; Imogene Christensen; Claire Engelhardt; Carlyle Brye; Arnold and Vernyll Yri; Ernest and Ruby Martinson; Miles Maddock and Dorothea Maddock; Olaf Solheim and Mabel Solheim; Leo Johnston and Minnie Johnston; Francis P. Schneider and Gloria Schneider; Appellees.

No. 89-5332.

Submitted May 16, 1990.
Decided Oct. 23, 1990.

Robert Pirtle, Seattle, Wash., for appellant.

George W. Van Cleve, Washington, D.C., for appellees.

Before *FAGG,* Circuit Judge, and *BRIGHT* and HENLEY, Senior Circuit Judges.

BRIGHT, Senior Circuit Judge.

The Devils Lake Sioux Tribe (the Tribe) appeals a district court order granting the United States' motion for summary judgment and dismissing its complaint against the United States, North Dakota, the Garrison Conservancy District and several littoral land owners in this quiet title action under 28 U.S.C. § 2409a (1988). In this action, the Tribe sought (1) a declaration that the United States holds title to the bed of Devils Lake in trust for the

benefit of the Tribe, (2) immediate possession of the lakebed and (3) fair compensation for the defendants' past use. On appeal, the Tribe contests the district court's conclusion that the Tribe indisputably compromised and settled its claim to the lakebed in a settlement agreement with the United States in 1977. In addition, the Tribe contends that the district court erred in dismissing its action against the remaining defendants notwithstanding the judgment in favor of the United States.

We reverse the order granting the United States' motion for summary judgment and reinstate the Tribe's complaint against all defendants. Our review of the evidence convinces us that the circumstances surrounding the 1977 settlement present sufficient ambiguity and uncertainty to raise a material factual dispute.

I. BACKGROUND

The Devils Lake Sioux Tribe possesses beneficial title to the Devils Lake Reservation (also known as the Fort Totten Indian Reservation) in northeastern North Dakota. The Tribe is a constituent part of the Sisseton and Wahpeton Sioux Bands of the Great Sioux Nation (the Bands).

In 1867, the United States entered into a treaty with the Bands. This treaty, the Treaty of February 19, 1867, 15 Stat. 505, rewarded the Bands for their loyalty to the United States during the Sioux Uprising of 1862. In Article 2 of the Treaty, the United States recognized the Bands' claim to the lands

> bounded on the south and east by the treaty-line of 1851, and the Red River of the North to the

> mouth of the Goose River; on the north by the Goose River and a line running from the source thereof by the most westerly point of Devil's [sic] Lake to the Chief's Bluff at the head of James River, and on the west by the James River to the mouth of Mocasin River, and thence to Kampeska Lake.

This area included all of Devils Lake. Of future significance, the northernmost tip of this area, including the northern half of Devils Lake, overlapped with territory that the Chippewa claimed pursuant to a boundary agreement with the Bands called the Sweet Corn Agreement.[1] The relevance of this territorial overlap, which for convenience we refer to as the "Chippewa overlap region," will become apparent later in this opinion.

In Articles 3 and 4, the 1867 Treaty established two permanent reservations for the Bands within the lands described by Article 2. Article 3 of the 1867 Treaty established a reservation for the Bands at what is now Lake Traverse in South Dakota. The Lake Traverse Reservation is not otherwise relevant to the instant dispute.

Article 4 of the 1867 Treaty established a reservation for the Bands at Devils Lake. The Devils Lake Reservation (the Reservation) consisted of a tract

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[1] Under the Sweet Corn Agreement, executed some time after 1825, the Bands agreed to the Chippewa's occupancy of all lands north of a line extending west from the Goose River and passing through the center of Devils Lake. For our purposes, it remains unnecessary to determine whether the United States possessed awareness of the Chippewa's competing claim when it entered into the Treaty of February 19, 1867 with the Sisseton and Wahpeton Bands.

> [b]eginning at the most easterly point of Devil's [sic] Lake; thence along the waters of said Lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

The parties to the instant action disagree whether the above description encompassed the bed of Devils Lake. To explain, in accordance with the above description, the Reservation (which may or may not have included the lakebed) was nestled into the northwestern portion of the Article 2 lands and completely encompassed by them. As mentioned above, these Article 2 lands also encompassed Devils Lake, the shore of which formed the northern boundary between the Reservation and the Article 2 lands. But which shore? Article 4 does not clearly delineate whether the parties to the 1867 Treaty intended the northern or southern shore of Devils Lake as the boundary line of the Reservation. If the boundary was the northern shore, as the Tribe contends, then the Reservation included the lakebed. Conversely, if, as the United States contends, the southern shore formed the boundary, then the lakebed lay outside of the Reservation.

The above dispute is important, because in 1872 the Bands entered into another agreement with the United States regarding the above lands. In this agreement, the Agreement of September 20, 1872, 17 Stat. 456, 18 Stat. 167, the Bands ceded title to all lands described in Article 2 of the Treaty of February 19, 1867, except for the reservations set out in Articles 3 and 4. Thus, depending on the interpretation of the 1867 Treaty, the Bands may or

may not have ceded title to the bed of Devils Lake in the 1872 Agreement.

In 1946, Congress established the Indian Claims Commission to hear tribal claims against the United States. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (current version at 25 U.S.C.S. § 70 to 70v-3 (Law.Co-op.1983 & Supp.1990)). The Commission's jurisdiction extended to a broad variety of legal and equitable claims arising on or before August 13, 1946. *Id.* § 2, 60 Stat. at 1050. The Act empowered the Commission to grant monetary compensation but not declaratory or injunctive relief. *Navajo Tribe v. New Mexico,* 809 F.2d 1455, 1461 (10th Cir.1987).

In 1951, the Sisseton and Wahpeton Bands, in combination with other Sioux bands, filed a petition against the United States under the Act of August 13, 1946. This petition, as subsequently amended, asserted a two-part claim that retains relevance in the instant action. The first part, "the Reservation claim," alleged an unlawful taking or appropriation of lands originally ascribed to the Devils Lake Reservation by Article 4 of the 1867 Treaty. This claim included a request for compensation for 64,908 acres of land erroneously omitted from the Reservation in 1875 by a government surveyor, Charles Bates.

The second part, "the aboriginal title claim," asserted a right to fair compensation for (1) the treaty lands ceded to the United States under the Agreement of September 20, 1872, and (2) certain aboriginal lands known as the "Southern Triangle," which are not disputed in the instant action.

Neither the Reservation claim nor the aboriginal title claim made explicit reference to the bed of Devils Lake.

Nevertheless, the Tribe's amended petition may have contained an implicit reference to the lakebed. To elaborate, the Tribe's amended petition used certain maps, popularly called "Royce maps," to refer to the areas in contention.[2] Thus, the Tribe's amended petition identified the Devils Lake Reservation by area 497 on the Royce map (Royce 497) and the 1872 cession, in relevant part, as Royce 538. Admittedly, these Royce maps seem to describe the Reservation as lying south of the lakebed.[3]

In 1970 and 1971, the Bands presented the above claims to the Indian Claims Commission. During those proceedings, the parties continued to use the Royce maps to refer to the areas in question.

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[2] These maps, drawn by Charles Royce in the 19th Century, purported to illustrate numerous Indian land cessions in the United States. *See* C. Royce, *Indian Land Cessions in the United States, reprinted in* Eighteenth Annual Report of the Bureau of American Ethnology, pt. II (1899). The Royce maps, while not a binding authority, were commonly used for convenience to identify the areas in question in proceedings before the Indian Claims Commission.

[3] On the Royce maps, Royce 538 (the 1872 cession) completely encircles Royce 497 (the Reservation). In addition, the Royce maps depict Royce 497 (the Reservation) as bounded by the southern shore of Devils Lake. Although the maps show no similar boundary line between the northern shore of Devils Lake and Royce 538, the Tribe argues that some ambiguity still remains. Specifically, the Tribe points out that the maps, which employ color codes to depict the various tracts in question, show Royce 497 as purple, Royce 538 as yellow and the lakebed as blue. From this, the Tribe argues that the Royce maps depict the lakebed as lying outside of *both* Royce 497 and Royce 538. In this opinion, we do not deem it necessary to decide whether such an inference could reasonably be drawn from the Royce maps.

The Indian Claims Commission dealt with the Bands' claims in separate opinions. In 1973, the Commission ruled in favor of the Bands on the Reservation claim, including the claim for the 64,908 acres omitted by the erroneous Bates survey. *Lower Sioux Indian Community v. United States*, 30 Ind.Cl.Comm. 463 (1973). In this decision, the Commission described the Reservation as lying south of Devils Lake, *id.* at 483, 500-01, but did not address the title to the lakebed. The Bands prevailed on appeal, *Lower Sioux Indian Community v. United States*, 519 F.2d 1378, 207 Ct.Cl. 492 (1975), and ultimately received full compensation for the Reservation claim.

In 1975, the Commission ruled for the Bands on the aboriginal title claim. *Lower Sioux Indian Community v. United States*, 36 Ind.Cl.Comm. 472 (1975). In this decision, the Commission did not explicitly address the title issue, but appeared to implicitly include Devils Lake in the ceded territory. *Id.* at 473 & n. 2. In addition, the Commission's opinion suggested that the Tribe was entitled to compensation for the Chippewa overlap region, *id.* at 486-88,[4] which, as mentioned above, included part of Devils Lake. The Government appealed.

While the appeal was pending, the Department of the Interior issued an opinion on the Reservation boundary. This opinion, rendered in 1976, responded to an inquiry

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[4] This part of the opinion amounted to a seeming reversal of the Commission's position in *Turtle Mountain Band of Chippewa Indians v. United States*, 26 Ind.Cl.Comm. 336, 340-43 (1971), which recognized the Plains-Ojibwa's claim to the Chippewa overlap region.

by the Attorney General of North Dakota about the acreage covered by the lakebed.[5] In fashioning this inquiry, the North Dakota Attorney General had apparently assumed that North Dakota acquired title to the bed of Devils Lake upon becoming a state in 1889. The Department of the Interior, however, in a memorandum drafted by an Associate Solicitor for Indian Affairs, concluded that "Devils Lake is not adjacent to the Fort Totten [Devils Lake] Sioux Indian Reservation but wholly within its boundaries and the United States holds title to the lakebed in trust for the Devils Lake Sioux Tribe."[6] Appendices, vol. I, at 35.

The Department's opinion was communicated to the Devils Lake Sioux Tribe later that year. By early 1977, the Tribal Council for the Devils Lake Sioux Tribe met to discuss the Department's memorandum. On May 31, 1977, the Bands offered to settle their aboriginal title

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[5] The Attorney General's inquiry was prompted by an agreement, entered into in the 1960's, between North Dakota and the United States to engage in a water conservancy project, known as the Garrison Diversion Conservancy District. To pay for its share of the cooperative undertaking, North Dakota deeded its title to various lakelands to the United States in 1971. One of these lakelands was Devils Lake. The agreement, however, satisfied North Dakota's obligation only to the extent that the titles remained free of encumbrances from both the Tribe and adjoining landowners. *101 Ranch v. United States*, 905 F.2d 180, 184 & n. 7 (8th Cir.1990). In 1984, the Tribe attempted to intervene in *101 Ranch*, but the district court denied the request. The instant action to quiet title subsequently ensued.

[6] The United States asserted this position in subsequent litigation, Appendices, vol. I, at 65-66, but ultimately abandoned it, Appendices, vol. II, at 96.

claim with the United States for $1.50 per acre. The settlement offer contained no references, either implicit or explicit, to the Royce maps. Instead, the offer delimited the settlement area, in essence, as the lands described by Article 2 of the 1867 Treaty plus the Southern Triangle, with two noteworthy exceptions. First, the settlement offer excluded "the acreage within the exterior bounds of the Lake Traverse Reservation and the Devil's [sic] Lake Reservation *as described in Articles 3 and 4 of the Treaty of February 19, 1867.*" Supplemental Appendix of Appellee United States at 26 (emphasis added) (citation omitted). Second, the settlement offer expressly excluded the Chippewa overlap region, notwithstanding the Indian Claims Commission's seeming recognition of the Bands' entitlement to compensation for this area, *see* discussion *supra* pp. 1052-1053 & note 4.

The United States accepted the offer and instructed the Bureau of Land Management (the Bureau) to calculate the applicable acreage. Upon completing the task, the Bureau sent out the following letter:

August 1, 1977

Assistant Attorney General

Land and Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530

Attn: Mr. Bernard M. Sisson, Attorney-at-Law

Dear Mr. Sisson:

Re: Lower Sioux Indian Community in Minnesota, et al v. United States, Docket No. 363, before the Indian Claims Commission

Pursuant to Mr. Hickey's letter of June 21, 1977, we have computed the acreage in the overlap of the lands in the plaintiff's case with the lands of the Turtle Mountain Band of Chippewa Indians, Docket Nos. 113, et al.

Initially you requested only a computation of the overlap acreage, using a previously drawn preliminary map which was provided by you, as we had nothing in our files regarding the area in question.

After a preliminary study, which revealed virtually no overlap, and which cast doubt on the plotting of the above mentioned map, you requested by telephone that we research, replot, and recompute the acreage for the entire area involved in this case, in addition to computing the overlap acreage.

We have done so, computing the acreage on the WANG 2200 computer.

The amended acreages are as follows:

(1) Royce area 538

6,355,000 ac.

(2) Balance of the area described in Article 2 of the Treaty of February 19, 1867, outside of Royce area 538.

2,800,000 ac.

NOTE – The above areas *include* the acreage of the Fort Totten (Devils Lake) Indian Reservation, but *exclude* the acreage of the Sisseton (Lake Traverse) Indian Reservation.

You stated that you would deduct a previous acreage for the Fort Totten Reservation from the total.

(3) "Southern Triangle" (the area described in 2. of Mr. Hickey's letter of December 23, 1975).

565,000 ac.

Gross acreage – the sum of the above areas.

9,720,000 ac.

(4) Overlap with Turtle Mountain Band of Chippewa Indians, Docket Nos. 113, et al – land area only; disregard water area of Devils Lake per your instructions. Derived by plotting Devils Lake from the earliest official Government Land Office survey plats.

138,000 ac.

Sincerely yours,

Acting Chief, Division of Cadastral Survey

Appendices, vol. I, at 105-06 (emphasis in original).

Based on the acreage figures provided by the Bureau, the total value of the land was calculated at $13,929,661. *See Lower Sioux Indian Community v. United States,* 41 Ind.Cl.Comm. 1, 3 (1977). Thus, given the $1.50 per acre figure, the 1977 settlement compensated the Bands for roughly 9,286,441 acres. It therefore appears that the parties deducted 295,559 acres for the Devils Lake Reservation, as calculated below:

$13,929,661	/ $1.50/acre = 9,286,440.6 acres
6,355,000	Royce 538 (Article 2 of 1867 Treaty)
2,800,000	Article 2 area outside Royce 538
+ 565,000	Southern Triangle
9,720,000	Gross Acreage
-9,286,441	Settlement Acreage
433,559	Total Acreage Deductions
- 138,000	Chippewa overlap region

295,559 Deduction for Devils Lake Reservation

In 1981, the Department of the Interior withdrew support from its 1976 opinion that had recognized the Tribe's beneficial ownership of the lakebed. After attempting to intervene in a related action in 1984, *see supra* note 5, the Tribe filed this quiet title action against the United States, North Dakota, the Garrison Conservancy District and several private landowners.

The United States moved for summary judgment against the Tribe, listing several alternative grounds.[7] The district court granted the motion on a theory that the Tribe compromised and settled its claim against the United States in the 1977 settlement. *Devils Lake Sioux Tribe v. North Dakota*, 714 F.Supp. 1019, 1025-26 (D.N.D.1989). Specifically, the district court concluded that the Tribe necessarily received compensation for the lakebed under the 1977 settlement, because:

(1) the Indian Claims Commission's opinions discussing the Bands' claims demonstrated that the Commission understood the Reservation to lie south of Devils Lake;

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[7] In the district court proceedings, the United States asserted that the Tribe's claims were barred by (1) res judicata, (2) collateral estoppel, (3) the statute of limitations and (4) the terms of the 1977 settlement. The district court did not appear to address the United States' contentions on the first three issues, nor did the parties brief them for this appeal. Consequently, we confine our discussion to the United States' fourth contention, *i.e.*, that the 1977 settlement bars the instant claim.

(2) the Royce maps, which the parties used to identify the relevant tracts during the Claims Commission proceedings, unambiguously put the lakebed in Royce 538, which lay outside the Reservation boundaries; and

(3) the Bureau of Land Management letter demonstrated that the Bureau, in calculating the acreage for Royce 538, explicitly excepted the land area of the Chippewa overlap region but did not similarly except the lakebed. *Id.* at 1022-24.

The district court further concluded that the Tribe could not maintain its action against the other parties in the absence of the United States and dismissed the Tribe's complaint against all defendants.

On appeal, the Tribe contends that the factors cited by the district court are sufficiently equivocal to preclude summary judgment on a compromise and settlement theory. We agree with the Tribe and reverse the order of summary judgment for the reasons discussed below.

II. DISCUSSION

A court lacks authority to grant a summary judgment motion unless a party demonstrates that "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). The term "material fact" includes the inferences that reasonably may be drawn from undisputed facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 255, 106 S.Ct. 2505, 2510, 2513, 91 L.Ed.2d 202 (1986). Under our view of the record, a genuine factual dispute existed as to whether the Tribe settled its claim to the lakebed in 1977.

Under the Government's theory, the Tribe's claim to the lakebed turns on the interpretation of the 1977 settlement agreement. An agreement to settle a legal dispute is a contract. *Village of Kaktovik v. Watt*, 689 F.2d 222, 230 (D.C.Cir.1982). As such, its interpretation is governed by familiar principles of contract law. *See id.* Accordingly, the court's objective in interpreting a settlement agreement is to ascertain the actual intent of the parties at the time they executed it. *See Uinta Tunnel, Mining & Transp. Co. v. Ajax Gold Mining Co.*, 141 F. 563, 566 (8th Cir.1905); *Piver v. Pender County Bd. of Educ.*, 835 F.2d 1076, 1083 (4th Cir.1987), *cert. denied*, 487 U.S. 1206, 108 S.Ct. 2847, 101 L.Ed.2d 885 (1988). In construing an agreement, the court should endeavor to place itself in the position of the contracting parties and view the agreement in light of the facts and circumstances surrounding its execution. *Cook v. Foley*, 152 F. 41, 49 (8th Cir.1907) (quoting *Rockefeller v. Merritt*, 76 F. 909, 915 (8th Cir.1896)), *cert. denied*, 209 U.S. 543, 28 S.Ct. 570, 52 L.Ed. 919 (1908). *But cf. NRM Corp. v. Hercules Inc.*, 758 F.2d 676, 682 (D.C.Cir.1985) (absent ambiguity, court will confine inquiry to four corners of agreement).

The agreement in the instant case permits the inference that the parties excluded the lakebed from the 1977 settlement. Most significantly, the figures listed in the Bureau of Land Management letter suggest that the parties subtracted 295,559 acres to account for the Reservation. This figure is reasonably consistent with the Government's own acreage estimates for the Reservation inclusive of the lakebed. Indeed, according to the affidavit of James Simpson, a Government surveyor, the land area of the Reservation in 1867 encompassed some

233,875 acres and the lakebed some 72,300 acres. Thus, by the Government's own estimate, the combined area of Reservation land plus original lakebed consisted of 306,125 acres.

In addition, even the relatively small discrepancy between the actual acreage subtracted (295,559) and the Government's estimate of the original combined acreages (306,125) can be explained. Specifically, by the Government's admission, the parties to the 1977 settlement did not conduct a historical survey to determine the original lakebed acreage, and the Simpson affidavit indicated that the lakebed has shrunk considerably since 1867.

The above figures are further buttressed by an affidavit submitted by Marvin Sonosky, the tribal attorney who negotiated the 1977 settlement. According to Sonosky, "At no time was any question raised as to the acreage underlying the waters of Devils Lake." Appendices, vol. I, at 103. The import of the above statement is that the Tribe may have gone uncompensated for the lakebed by the 1977 settlement.

Accordingly, we think the district court read too much into the Bureau of Land Management letter. This letter does not say that the lakebed acreage was included in the 9.2 million acres that the Bureau attributed to Royce 538. Further, the letter itself casts doubt on the parties' intent to rely on the Royce boundaries. According to the Bureau letter, the Government initially provided the Bureau with a "previously drawn preliminary map," and not a Royce map, of the areas in question.

The Government nevertheless contends that certain calculations in the district court's opinion prove that the

parties' deduction for the Reservation could not have included the lakebed. The Government's reliance on the district court's figures, however, is misplaced. To explain, the district court opinion includes a chart, which at first glance appears to indicate that the parties deducted only 230,651 acres to account for the Reservation. 714 F.Supp. at 1024. Upon further examination, though, it becomes clear that the district court's figures do not represent the size of the *original* Reservation in 1867. Instead, the court's figures represent the size of the Reservation in 1875, after the Bates survey erroneously omitted 64,908 acres from its boundaries. *Id.* at 1024 & n. 5. This is confirmed by historical data that the Government itself supplied in the proceeding before the district court. Memorandum in Support of Motion for Summary Judgment at 36-38 (Document No. 117). This data indicates that, without the lakebed, the Reservation encompassed some 230,400 acres before the Bates survey. *Id.* at 37.

Furthermore, the circumstances surrounding the 1977 settlement also permit the inference that the parties excluded the lakebed from their agreement. To begin with, we are struck by the fact that the parties settled this case within months after the Department of the Interior issued a memorandum opining that the United States held the lakebed in trust for the Tribe. In addition, we deem it noteworthy that the settlement agreement defines the Reservation boundaries solely by reference to the Treaty of February 19, 1867, and is devoid of any reference to the Royce maps. In view of the parties' prior practice of incorporating the Royce maps in their territorial definitions, an inference remains that the parties

intended to abandon the Royce maps and rely solely on the 1867 Treaty to delimit the Reservation boundaries.

We further deem it significant that the 1977 settlement expressly excluded the Chippewa overlap region. Notably, the Indian Claims Commission suggested that the Bands were entitled to compensation for this area, which included half of Devils Lake. Thus, one implication of the provision excluding the overlap region is that the parties intended to exclude the lakebed from the settlement.

In a word, the district court placed undue emphasis on the parties' manner of presenting their case before the Indian Claims Commission in 1970-71 and the Commission's resultant understanding of the boundaries now in question. The crucial question in this case is what the parties intended in 1977 when they opted to settle the aboriginal title claim. Thus, for the purpose of interpreting the 1977 settlement, the parties' representations before the Indian Claims Commission possess relevance only insofar as these representations remain a valid indicia of the parties' intent in 1977.

The Government nevertheless asserts that the following provision in the stipulation for settlement expressly precludes the Tribe's present claim:

> 5. Subject to the provisions of Paragraph No. 1 of this stipulation, the entry of final judgment as described in Paragraph No. 3 above, shall finally dispose of all rights, claims, or demands which the plaintiffs have asserted, or could have asserted in Docket No. 363 [*Lower Sioux Indian Community v. United States*]. . . .

Supplemental Appendix of Appellee United States at 36. We remain unconvinced. The facts of the instant case suggest that the parties may have deliberately excluded the lakebed from the 1977 settlement because they considered it part of the Reservation. Admitting such a possibility, it would be counterintuitive to conclude as a matter of law that the parties intended the 1977 settlement to prevent the Tribe from asserting a subsequent claim to the lakebed.

Beyond this, it remains subject to question whether the Tribe could have presented its claim to the lakebed before the Indian Claims Commission. As mentioned above, the Indian Claims Commission retained jurisdiction only over claims arising prior to 1946. By contrast, the Tribe asserts that its claim arose in 1981 when the United States allegedly refused to recognize the Tribe as the beneficial owner of the lakebed. Moreover, the Commission could only award monetary relief and possessed no authority over non-federal defendants.

We therefore remand this case to the district court for proceedings consistent with this opinion. The record does not support a summary judgment on a theory that the 1977 settlement disposes of the Tribe's alleged rights. For the reasons mentioned above, this issue requires further development on the merits.

III. CONCLUSION

Accordingly, we reverse the district court's order granting summary judgment for the United States on the basis of compromise and settlement. In addition, we

reverse the order dismissing the Tribe's complaint against the remaining defendants because this dismissal was premised on the dismissal of the United States. We express no opinion on the merits of the United States' other contentions in support of summary judgment. Likewise, at this juncture, we express no opinion on whether the Tribe could maintain its action against the remaining defendants in the absence of the United States.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 00-1819

Spirit Lake Tribe, formerly known as Devils Lake Sioux Tribe,

Appellant,

v.

State of North Dakota; Garrison Diversion Conservancy District; United States of America; 101 Ranch, a North Dakota Partnership; Ruth Ward; Ralph Ward; Steve A. Ward; Imogene Christensen; Claire Engelhardt; Carlyle Brye; Arnold Yri; Vernyll Yri; Reginal Herman; Eileen Herman; Clifford M. Johnson; Melvin Diehl; Dustin King; Estate of Mabel Solheim; Estate of Minnie Johnston; Francis P. Schneider; Gloria Schneider,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 12, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

[LOGO] Exhibit A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 21 1976

MEMORANDUM

To: Associate Solicitor
Division of Energy & Resources

From: Associate Solicitor
Division of Indian Affairs

Subject: Inquiry from Attorney General of North Dakota regarding title to bed of Devils Lake

By Memorandum dated February 13, 1976, you requested my assistance in determining the status of the title to the bed of Devils Lake in North Dakota. Your request was prompted by a letter from the Attorney General of the State of North Dakota wherein a request was made of this Department for an opinion as to the location of the lake's ordinary high water mark for the purpose of establishing the quantum of lakebed which the State assumes passed to it when admitted to the Union in 1889. In this regard, the Attorney General also requested an opinion as to the location of the "lakeside boundary" of the Fort Totten Sioux Indian Reservation which, in the Attorney General's view, is located "on the shore of Devils Lake."

I am of the opinion that Devils Lake is not adjacent to the Fort Totten Sioux Indian Reservation but wholly within its boundaries and the United States holds title to the lakebed in trust for the Devils Lake Sioux Tribe.

The Fort Totten Sioux Indian Reservation was established by Treaty dated February 19, 1867, 15 Stat. 505, Article IV of that treaty described the reservation's boundaries as follows:

> "Beginning at the most *easterly* point of Devil's Lake; thence *along the waters of said lake* to the most westerly point of the same; thence on the direct line to the nearest point on the Cheyenne river; thence down said river to a point opposite the lower end of Aspen island, and thence on a direct line to the place of beginning." [Emphasis added]

I interpret the language "along the waters of said lake" to place the boundary of the reservation along the north-eastern shoreline of Devils Lake thereby encompassing the entire lake within the reservation.[1] Therefore, at the establishment of the reservation in 1867, the United States held the title to the bed of Devils Lake in trust for the benefit of the Devils Lake Sioux Tribe. See *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942).

Evidently, it is the State's position that, by reason of the "equal footing doctrine," title to the bed of Devils Lake

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[1] Even if the description of the boundaries of the reservation were less clear, I believe that the principle enunciated by the Supreme Court that "doubtful expressions are to be resolved in favor of Indians" would be controlling. See *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 174 (1973); *Antoine v. Washington*, 95 S. Ct. 944 (1975).

passed to it upon statehood in 1889.[2] Even assuming that Devils Lake was navigable in 1889[3] the equal footing doctrine is not applicable in this instance because, in 1889, the United States held title to the entire lakebed for the benefit of the Tribe. See *Montana Power Company v. Rochester, supra.*

We have been advised that the Acting Regional Solicitor, Denver, in an opinion dated August 27, 1971, determined that, by reason of the Act of April 27, 1904, 33 Stat. 319, the Devils Lake Sioux Tribe ceded to the United States all its claim, right, title, and interest to the bed of Devils Lake. Article I of the 1904 Act, *supra,* provides, in part, that the Tribe cede to the United States "all their claim, right, title, and interest in and to all that part of the . . . reservation now [in 1904] remaining unallotted. . . . " Apparently, it was the position of the then Acting Denver Regional Solicitor that, since Devils Lake is a navigable body of water, the bed of the lake was never part of riparian allotments within the reservation[4] and therefore, by reason of the 1904 Act, *supra,* the Tribe was divested of all title and interest to the bed of the lake. I disagree. The 1904 Act, *supra,* is a ratification of an agreement executed

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[2] In general, title to public lands below the high water mark of navigable waters in territories is held for the benefit of future states and will pass to the states by operation of law unless Congress evidences a contrary intent. See *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1969).

[3] Apparently the State of North Dakota is relying upon the case entitled *Rutter v. State of North Dakota,* 93 N.W. 2d 796 (N. Dak. Sup. Ct. 1958), wherein all parties stipulated that Devils Lake was navigable.

[4] See *Montana Power Company v. Rochester, supra.*

between the Tribe and an authorized Government Indian Agency whereby the Tribe agreed to cede to the United States all land within the reservation not previously allotted to its members and open such surplus land to homestead settlement.

It is well established that enactments pertaining to the taking of Indian property are to be construed narrowly, as giving congressional consent only to the most limited extinguishment of Indian proprietary rights necessary for the fulfillment of the purpose of the taking. *Mattz v. Arnett*, 412 U.S. 461 (1973); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941); *United States v. Nice*, 241 U.S. 591 (1916). The 1904 Act was intended only to open up the unallotted surplus lands within the reservation for homestead settlement with payment to be made to the Tribe out of the proceeds of the sale of the surplus lands in return for the Tribe's waiver of claim against the United States for the erroneous exclusion of land from the reservation and timber used to construct the Fort Totten Military Base. Nothing in the Act or its legislative history gives the slightest hint that the Tribe intended to cede any portion of the bed of Devils Lake to the United States. Certainly, the lakebed was not proposed to be opened for sales and settlement, which was the purpose of the 1904 Act. I therefore conclude that the Tribe has held equitable title to the bed of Devils Lake since 1867.

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